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Recent numbers of the *American Law Review*, the *Albany Law Journal* and the *Chicago Legal News* are full of the contemplated summer trip to Europe on the part of the editors of those magazines. While we congratulate our brothers on their ability to put aside their work and indulge in the aristocratic pleasure of "doing Europe," we think it decidedly heartless for them to add to the already bitter cup of the editor who is obliged to remain at work, during these hot months, by continually dwelling upon their anticipated fun, and calling attention to the good things in store for them on the other side of the water. In this hot and trying hour, when, to judge from the enthusiastic anticipations of these gentlemen, life in any place but Europe is not worth living, we are somewhat reconciled to our hard fate by the reflection that what is their gain may, perhaps, be the gain also of the readers of their journals. The good things of this world seem unequally distributed, and our modesty should not stand in the way of our saying that we deserve a trip to Europe quite as much as these gentlemen. The longer we live and the harder we strive, the more we are impressed with the eternal truth of the Mikado's utterance that "virtue is triumphant only in theatrical performances." We shall live in the hope that the time is not far distant when we may also see Europe, and at the same time give our readers as agreeable a rest as these gentlemen are now giving to theirs.

The organization of the new federal courts of appeal in the different circuits is an event of sufficient interest and importance to require a passing notice. The design of the framers of the bill, which provides for the establishment of these courts, was not only to relieve the supreme court, in the already crowded condition of its docket, but also to lessen and shorten the delays which have clogged the progress of litigation in the federal courts. The new court will, in its jurisdictional features at least, be a substantial innovation, in that it is clothed with a large share of the appellate jurisdiction heretofore exercised by the United States Supreme Court. In what will probably constitute a majority of cases the decision of the new court is to be final, except that the court has the right to certify any questions of law to the supreme court for its instruction, and that where the court does not make such a certificate, the supreme court has power to issue a *certiorari* to require causes to be certified to it for hearing on appeal. The decision of the court is to be final in cases in which the jurisdiction is dependent upon the character of the suitors as citizens or aliens, in cases arising under the patent laws and under the revenue laws, in cases of inferior crimes which cannot be taken directly to the supreme court, and in admiralty cases other than prize. But we refer the reader for more definite information on this subject to the full text of the act to be found in 32 Cent. L. J. 392.

The new courts were all formally organized, but adjourned in each circuit until October. Their progress in disposing of litigation will be watched with close attention. If, as is to be hoped, they will relieve at once the overburdened supreme court and the army of litigants harrassed by delay, the country will have reason to be grateful. We should not, however, close our eyes to the fact that it is possible to protract litigation unnecessarily, even under the new system, and that the courts cannot do all that is expected of them without the co-operation of the bar. The provision allowing the grant of certificates by the new appellate court or the issue of writs of *certiorari* by the supreme court in case such certificates are refused, in particular opens a field which, as an exchange well says, "may be exploited to the detriment of a prompt administration of justice."

In each circuit a judge of the United States District Court was selected, under the provisions of the act, to serve temporarily as one of the court, until the regular appointments to be made by the president. Notwithstanding the pressure brought to bear on that official for the immediate appointment of the nine judges contemplated by the bill, he has announced his determination not to make

the appointments until the meeting of the senate next winter. A most creditable feature of the present administration has been the president's judicial appointments, which, as a rule, have been excellent, and we have no reason to doubt that in the selection of individuals for the important functions required of a judge of the United States Circuit Court of Appeals, the president will have in mind the same high standard of ability and qualification.

NOTES OF RECENT DECISIONS.

CARRIERS—NEGLIGENCE—ACT OF GOD.—The Supreme Court of the United States in Gleeson v. Virginia Midland Ry. Co., 11 S. C. Rep. 859, says that a land-slide in a railway cut which results from the loosening of the earth in its sides by a fall of rain which is not of unusual violence, is not such an occurrence as is embraced in the phrase "Act of God," and that a railroad company which maintains a cut with sides in such a condition that a land-slide of this character occurs therein, is guilty of negligence, though the immediate cause of the accident was vibration produced by a passing train. He is of the opinion that the land-slide was a common, natural event, such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. "Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be 'acts of God;' but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In Dorman v. Ames, 12 Minn. 451, it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and the same principle applies to this case." Ewart v. Street, 2 Bailey, 157, 162; Moffat v. Strong, 10 Johns. 11; Steam-Boat Co. v. Tiers, 24 N. J. Law, 697; Railway Co. v. Braid, 1 Moore P. C. (N. S.) 101.

NEGOTIABLE INSTRUMENT—NOTE—INDORSEMENT—DEMAND AND NOTICE OF PROTEST.—One among the several questions considered by the Supreme Court of Tennessee in Rosson v. Carroll, 16 S. W. Rep. 66, is of special value and rendered more interesting by reason of the learned opinion of the court, which is, we regret, too long for publication entire. It was there held that the time within which notice of demand and non-payment of a negotiable instrument must be given to an indorser after maturity is the same as in case of an indorsement before maturity. The court discusses exhaustively the authorities *pro* and *con*, and states the general result as follows:

What duties with respect to demand and notice, does the indorsee of an overdue note owe to his indorser? or what legal steps must he take to convert the conditional liability of the indorser into an absolute obligation to pay the debt? The distinguishing feature of the liability of an indorser of any negotiable paper is that such liability is contingent upon due presentment for payment and notice of dishonor. Though a note transferred after maturity "comes disgraced to the indorsee" (as said by Lord Ellenborough in Tinson v. Francis, 1 Camp. 19), and is, in his hands, subject to all equitable defenses attaching to it and existing between the maker and payee at maturity, it is nevertheless negotiable; and, in order that the indorser may be held liable, demand must be made of the maker and notice of non-payment given. Tied. Com. Paper, § 336; Chit. Bills, 159, 160; Byles, Bills, 168, 169; Rand. Com. Paper, §§ 674, 675; 2 Amer. & Eng. Enc. Law, 399, 407, 408; Story, Prom. Notes, § 178; Daniel, Neg. Inst. § 996; Leavitt v. Putnam, 3 N. Y. 494; Berry v. Robinson, 9 Johns. 121; Kirkpatrick v. McCullough, 3 Humph. 171; Duffy v. O'Conner, 7 Baxt. 500; Poole v. Tolleson, 1 McCord, 199; Ecfert v. Des Coudres, 1 Mill. Const. 69; Nash v. Harrington, 2 Aikens, 9; McKinney v. Crawford, 8 Serg. & R. 353. Yet the same strictness as to time of demand and notice is not in all particulars required with respect to such a note as must be observed in case of one indorsed before due. As between indorser and indorsee, a note transferred after maturity is deemed equivalent to a note payable on demand, and is subject to the same rule of diligence and in the matter of presentment for payment and notice of dishonor. To bind the indorser in such a case it is incumbent on the indorsee to see that due demand is made in a reasonable time and that notice is promptly given, if payment be refused. Rand. Com. Paper, §§ 671, 672, 1046, 1098; Daniel, Neg. Inst. §§ 611, 996; 2 Amer. & Eng. Enc. Law, 396, 397; 1 Pars. Notes & B. 381, 382, 519, 520; Byles, Bills (7th ed., by Sharswood), 211, 212, and note 169, 170; Colt v. Barnard, 18 Pick. 260; Jones v. Robinson, 11 Ark. 504; Graul v. Strutzel, 53 Iowa, 712, 6 N. W. Rep. 119; Bank v. Ezell, 10 Humph. 386; Patterson v. Todd, 18 Pa. St. 426.

The point most contested in argument at the bar—one ably and learnedly debated on both sides—concerns the time in which notice of the dishonor of a note indorsed when overdue shall be given to the indorser. It is urged for complainant that the indorsee of such an instrument should have reasonable time in

which to make demand, and like time in which to give notice. For defendant it is conceded that reasonable time is permitted for demand, but as to notice it is contended that it must be given with the same promptness as is required in case of indorsement before maturity. The authorities are somewhat in conflict, but we think the great weight of juridicial opinion, as expressed in the text-books and in judicial decisions, is in favor of the rule we have just stated, and sustains the proposition that the same diligence must be used in giving notice of dishonor to the indorser of an overdue note as is required by the law-merchant in notifying one who indorses before maturity. In our opinion, the rule as to notice of non-payment to indorsers of time notes before due and of demand notes is and should be the same. We have seen no difference stated as to that matter in any authority, and do not perceive how a sound distinction could be taken; the reason for the notice being the same in each case. Then, if it be true, as announced by numerous authorities already cited, that indorsed demand notes and time notes indorsed after maturity are governed by the same rule in regard to notice of non-payment, it follows that one and the same rule of notice is to be applied to all the three classes of notes mentioned,—time notes indorsed before due, notes payable on demand, and time notes indorsed after maturity. Why should not this be so? It simplifies the law-merchant and facilitates transactions in commercial paper, in respect to which simplicity and uniformity in the rules of law are all-important and conducive to the prosperity and welfare of every community, especially of commercial people. Why should one who acquires an overdue note have or need more time to give notice of non-payment than the indorsee of a note acquired before maturity? He is justly allowed more indulgence in demanding payment of the maker, because the indorser knew at the time of the transfer that the maker was then in default; but when he has had all reasonable time for that purpose, the reason is not so satisfactory for extending the same indulgence with respect to notice. Certainly no more time for notification is needed by the one indorsee than by the other.

NUISANCES — NOISE OF MANUFACTORY — STABLES—CARPET CLEANING. — Two recent cases have exhaustively reviewed the authorities on the subject of common law nuisances and their abatement. In one, Powell v. Bently, 12 S. E. Rep. 1085, by the West Virginia Supreme Court, it was held that the noise of a factory, which materially interferes with and impairs the ordinary physical comfort of human existence, may be treated as a nuisance. But the standard as to the effect must be the man of normal nervous sensibility and ordinary mode of living. Such cases depend in a peculiar degree upon their own facts and surrounding circumstances; so that courts of equity should proceed with great caution in abating or restraining such factory by injunction, and not enjoin unless the fact of nuisance is made in some way to appear clearly beyond all ground of fair questioning. The court considers that a question of this kind, is in its very nature one of degree, and the evidence by which to determine it is matter of opinion, based on experience and observation of the thing itself. The rule to guide in such cases is that the noise must be such as materially to interfere with and impair the ordinary comfort of existence on the part of ordinary people. Snyder v. Cabell, 29 W. Va. 48; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317. See also Smelting Co. v. Tipping, 11 H. L. Cas. 642; Walter v. Selfe, 4 De Gex & S. 315; Crump v. Lambert, L. R. 3 Eq. 409; Gaunt v. Fynney, L. R. 8 Ch. 8, and the recent cases, Bohan v. Gas-Light Co. (N. Y.), 25 N. E. Rep. 246; and on public nuisance, People v. Lead-Works (Mich.), 46 N. W. Rep. 735; Wiley v. Elwood (Ill.), 25 N. E. Rep. 570.

In the other case, Craven v. Rodenhausen, 21 Atl. Rep. 774, decided by the Pennsylvania Supreme Court, it was held that a carpet cleaning establishment and stable upon premises in a thickly settled neighborhood of private residences are nuisances where it appears that the dust and moths from the carpet cleaner and the stench and noises from the stable permeate the neighboring houses and disturb the inmates. The court says:

Nuisance is a question of locality and degree. In considering whether any act is a nuisance regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one neighborhood might not be so in another. Sturges v. Bridgman, L. R. 11 Ch. 852; Hurlbut v. McKone, 55 Conn. 31; Dennis v. Eckhardt, 3 Grant Cas. 390; McCaffrey's Appeal, 105 Pa. St. 253; Dallas v. Art Club, 44 Leg. Int. 512. Noises, odors or vibration that would result from the ordinary and usual use of a dwelling in a neighborhord of dwelling-houses are not nuisances because they offend the sense of a person of exquisite tastes, but the unusual disturbing use of a house in a neighborhood of dwellings, or in a mixed neighborhood, has frequently been restrained, either wholly or partially, according to the circumstances of location and the degree of the disturbance. In Wallace v. Auer, 32 Leg. Int. 238; 10 Phila. 356, the business of gold-beating set up in a quiet dwelling neighborhood was enjoined absolutely. In Harrison v. St. Mark's Church, 3 Week. Notes Cas. 384, an injunction restraining the ringing of church bells at unreasonable hours was issued. In Dennis v. Eckhardt, 3 Grant Cas. 390, the use of a tin and sheet-iron shop, the noise from which disturbed the complainant and his family, was enjoined absolutely. In Burke v. Myers, 10 Week. Notes Cas. 481, a stove-polish factory was enjoined from running between 8 P. M., and 8 A. M. In D lion v. State, 11 Week. Notes Cas. 18, a meat-chopping establishment was

enjoined from running between 8 P. M. and 8 A. M. In Briggs v. Vottler, 4 Week. Notes Cas. 272, an injunction was issued restraining the use of a bowling alley. Noise alone, unaccompanied with smoke, noxious vapors or noisome smells, may create a nuisance. Wood Nuis., § 511; Broder v. Saillard, L. R. 2 Ch. 692. And generally whatever produces physical discomfort, rendering houses in the neighborhood unfit for residence, or disturbs in an unreasonable degree the quiet enjoyment of a home, will be a nuisance. Bish. Eq. 3d ed.), § 429, p. 490; Eden Inj. 160. What is a nuisance is very largely a question of fact, in determining which all the circumstances must be taken into consideration with the right of the plaintiff and defendant to the use of their property. *Sic utere tuo ut alienum non lædas* is the fundamental principle on which cases of nuisances are decided. A man has a right to use his house as he pleases, but he must not do it in such a manner as to render the houses of his neighbors unfit for the purposes they were intended for. * * * While such establishments are not necessarily nuisances, or nuisances *per se*, they may become so by reason of their location and the manner in which the business is conducted. It is necessary to have carpets cleaned, and this involves a place where such work may be done, but care should be exercised to locate such establishments where they will cause the least annoyance to others.

CRIMINAL LAW — ROBBERY—EVIDENCE — FORCE.—In Thomas v. State, 9 South. Rep. 81, decided by the Supreme Court of Alabama, on indictment for robbery, it appeared that defendant met a person on the road carrying a gun, whom he stopped and engaged in conversation respecting its purchase, and the gun was handed to him. Being informed that the gun was loaded, he stepped back a few steps, and, pointing it at the prosecutor, said, "Run, or I will shoot you," whereupon the latter backed off some distance frightened, and the defendant ran off with the gun. It was held that defendant was not guilty. McClellan, J., says:

The authorities are well nigh uniform to the position that the violence or putting in fear which is an essential element of the crime of robbery must precede or be concomitant with the act by which the offender acquires the possession of the property. The offense is against both the person and against property. In so far as it is against the person it consists in personal violence or personal intimidation; in so far as it is against property it consists of manucaption *animo furandi*. If there be violence or putting in fear, however aggravated, without a taking and asportation of property, there may be an assault, or assault and battery, or an assault with intent to rob, but no robbery; on the other hand, if there be a taking by trick or contrivance, and carrying away with felonious intent, but no violence or putting in fear as a means of the caption of another's property, there is a larceny, but no robbery. Com. v. James, 1 Pick. 375. The three essential elements of the offense are felonious intent, force or putting in fear as a means of effectuating the intent, and by that means a taking and carrying away of the property of another from his person or in his presence. In the nature of things all these elements must concur in point of time, else the act done is not rounded out to the full measure of the capital felony. If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains, the possession. If putting in fear is relied on, it must be fear under duress of which the possession is parted with. The taking, as it has been expressed, must be the result of the force or fear; and force or fear which is a consequence, and not the means, of the taking, will not suffice. "The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offense is not robbery." 2 Bish. Crim. Law, § 1175. "It may also be observed," says Archibold, "with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or, rather, that a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely or without either violence or putting in fear, amount to robbery." 2 Archb. Crim. Pr. & Pl. p. 1289; also 2 Russ. Crimes, *108; Rex v. Harman, 1 Hale, P. C. 534. "It must appear," says Roscoe, "that the property, was taken while the party was under the influence of the fear; for if the property be taken first, and the menaces or threats inducing the fear to be used afterwards, it is not robbery." Rosc. Crim. Ev. p. 924. And Mr. Wharton recognizes the same doctrine. 1 Whart. Crim. Law, § 850. The adjudged cases fully support these texts. In an early case the facts were that the prisoner desired the prosecutor to open a gate for him, and while he was so doing, the prisoner took his purse. The prosecutor, seeing it in the prisoner's hand demanded it, when the prisoner answered, "Villian, if thou speakest of thy purse, I will pluck thy house over thine ears, and drive thee out of the country, as I did John Somers," and then went away with the purse; and because he did not take it with violence, or put the prosecutor in fear, it was ruled to be larceny, and no robbery for the words of menace were used after the taking of the purse. Rex v. Harman, 1 Hale, P. C. 534. See, also, Rex v. Grey, 2 East, P. C. 708; and Rex v. Gnosil, 1 Car. & P. 304, in which it is said by Garrow, B.: "To constitute the crime of highway robbery, the force used must be either before or at the time of the taking." In the case of Shinn v. State, 64 Ind. 13, it appeared that an accomplice of the defendant snatched money from the prosecutor and handed it to the prisoner, who attempted to make off with it, but was pursued and overtaken by the prosecutor, when a tussel ensued between all three of them for the possession of money. Mere snatching property from another is, by all the authorities, not robbery; hence, in this case, the force had to be predicated of the tussle, which occurred after the defendant had acquired the possession. It was held that force thus used subsequent to the taking, in an effort to retain the wrongful possession acquired by snatching, was not such force as is essential to the crime of robbery. The court said: "The evidence tended to show the fraudulent and felonious obtaining of money from the prosecuting witness by means of a previously arranged trick or contrivance, but did not sustain the charge of robbery contained in the indictment;" citing Huber v. State, 57 Ind. 341; and to like effect is the case of Hanson v. State, 43 Ohio St. 376, 1 N. E. Rep. 136. "Robbery," says the Supreme Court of Arkansas, "is defined to be a felonious taking of money or goods from the person of another, or in his presence, against his will, by violence or putting him in fear; and this violence must

precede or accompany the stealing." Clary v. State, 33 Ark. 561. And the same doctrine is held, substantially, in the following cases: People v. McGinty, 24 Hun, 62; State v. Jenkins, 36 Mo. 372; State v. Deal, 64 N. C. 270; State v. John, 5 Jones (N. C.), 163; State v. McCune, 70 Amer. Dec. 176, notes, 178.

ACTIONS AGAINST TELEGRAPH COMPANIES FOR INJURIES TO THE FEELINGS.

§ 1. *Damages Given for Injury to the Feelings Alone.*—Several courts have recently taken the view that damages may be given in an action against a telegraph company for the failure to transmit and deliver a message, where the only element of damages consists in injury to the feelings, and where there is no element of physical suffering or pecuniary loss.[1]

§ 2. *Judicial Observations in Support of this View.*—The Supreme Court of Texas, in holding injury to the feelings an independent element of damage, say: "In cases of bodily injury, the mental suffering is not more directly and naturally the result of the wrongful act than in this case,—not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in the doing of the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness, as well as by a wound to the person.[2] The Court of Appeals of Kentucky, speaking upon the same subject, say: "It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element to the actual damage in slander, libel and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult, added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."[3]

§ 3. *Rule Clearer where the Mental is Coupled with Physical Pain.*—Some of the courts seem to proceed upon the idea that damages for injury to the feelings can only be given where the plaintiff is entitled to recover other compensatory damages: in other words, that damages for injury to the feelings can only be given as supplemental damages, so to speak. This idea has probably been adopted from the rule which has obtained in respect of exemplary damages. Such damages, it is well known, are given for mere punishment or example, and can never be given except where the facts disclose grounds for recovering compensatory damages; otherwise a man might bring a civil action for a mere criminal offense. The Supreme Court of Alabama, in a late case,

[1] Stuart v. Western Union Tel. Co., 66 Tex. 580; reaffirmed in Wilson v. Gulf, etc. R. Co., 69 Tex. 739, and in Western Union Tel. Co. v. Cooper, 71 Tex. 507; s. c., 10 Am. St. Rep. 772; 9 S. W. Rep. 598; 1 L. R. A. 728; Western Union Tel. Co. v. Broesche, 72 Tex. 654; s. c., 10 S. W. Rep. 734; Western Union Tel. Co. v. Simpson, 73 Tex. 423; s. c., 11 S. W. Rep. 385; Western Union Tel. Co. v. Adams, 75 Tex. 531; s. c., 6 L. R. A. 844; 12 S. W. Rep. 857; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695; s. c., 6 Am. St. Rep. 864; 8, S. W. Rep. 574; Reese v. Western Union Tel. Co., 123 Ind. 294; s. c., 24 N. E. Rep. 163; Beasley v. Western Union Tel. Co., 39 Fed. Rep. 181; Western Union Tel. Co. v. Henderson, 89 Ala. 510; s. c., 7 South. Rep. 419; Thompson v. Western Union Tel. Co. 106 N. C. 549; S. c., 11 S. E. Rep. 269; Chapman v. Western Union Tel. Co. (Ky.), 13 S. W. Rep. 880; Young v. Western Union Tel. Co., 107 N. C. 370; s. c., 11 S. E. Rep. 1044; 42 Alb. L. J. 518; Thompson v. Western Union Tel. Co., 107 N. C. 449; s. c., 12 S. E. Rep. 427.

[2] Stuart v. Western Union Tel. Co., 66 Tex. 580; quoted with approval in Western Union Tel. Co. v. Cooper, 71 Tex. 507; s. c., 10 Am. St. Rep. 772.

[3] Chapman v. Western Union Tel. Co. (Ky.), 13 S. W. Rep. 880; quoted with approval in Young v. Western Union Tel. Co., 107 N. C. 370; s. c., 11 S. E. Rep. 1044; 42 Alb. L. J. 518.

seem to doubt the soundness of this distinction, and hold that whatever the rule may be where the addressee brings the action, yet where it is brought by the sender of the message, he may recover such damages, because he is entitled to other actual damages for the breach of the contract between him and the defendant, to the extent of the price paid for transmitting the message at least.[4] While there seems to be no real sense in this distinction, many courts uphold it, as we shall see.

§ 4. *Not Given as Exemplary Damages.*—On the contrary, damages for mental suffering, when given, are given on the theory of compensation, though the facts may often be such as to authorize a further award of damages by way of punishment or example. Accordingly a petition which discloses no other ground of recovery than injury to the feelings through the non-delivery of a message through the mere negligence or forgetfulness of the employees of the company, does not, it has been held, disclose a case for exemplary, but only for actual damages.[5] Keeping in mind the rule that exemplary damages are given only in cases of malice, fraud, oppression, or negligence so gross as to evince a disregard of social duty, and to be therefore tantamount to malice,—we are prepared for the view that mental suffering occasioned merely by the negligent failure to transmit a message containing nothing indicating its special importance, which was not otherwise made known to the agent, is not a ground for the recovery of such damages.[6]

§ 5. *View that no Damages can be Given for Mere Mental Anguish.*—No damages can, in the view of some courts, be recovered for mere mental anguish or suffering produced by the failure to deliver a telegraphic message unless (and such a case can hardly be conceived) the failure has resulted in physical suffering which is the proximate cause of the mental suffering.[7] Accordingly, where the action was for damages for failing to deliver a message in which a son notified his father of the death and funeral of a brother of the latter, it was intimated that damages for the mental disappointment and suffering could not be recovered.[8]

[4] Western Union Tel. Co. v. Henderson, 89 Ala. 510; s. c., 7 South. Rep. 419. So held in Reese v. Western Union Tel. Co., 123 Ind. 224; Thompson v. Western Union Tel. Co., 106 N. C. 549; s. c., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634. On the second appeal in this case the distinction was abandoned. 107 N. C. 449.

[5] Stuart v. Western Union Tel. Co., 66 Tex. 580; s. c., 59 Am. Rep. 623; distinguishing on this point, Gulf, etc. R. Co. v. Levy, 59 Tex. 542; s. c., 46 Am. Rep. 269. In this last case there was no contract relation between him and the company, so the court held that in the failure to deliver the message the company was only guilty of a tort, and in such a case actual damage must be shown to let in exemplary damages or damages to the feelings. In the Stuart case (*supra*), there was a contract relation, and the court held that the two cases were thus distinguishable.

[6] McAllen v. Western Union Tel. Co., 70 Tex. 243; s. c., 7 S. W. Rep. 715.

[7] Russell v. Western Union Tel. Co., 3 Dak. 315; West v. Western Union Tel. Co., 39 Kan. 93; s. c., 9 Am. St. Rep. 530; 17 Pac. Rep. 807; Chase v. Western Union Tel. Co., 44 Fed. Rep. 554.

[8] West v. Western Union Tel. Co., 39 Kan. 93; s. c., 9 Am. St. Rep. 530. "Such damages," it is said, "can only enter into and become a part of the recovery where the mental suffering is the natural, legitimate and proximate consequence of the physical injury." Salina v. Trosper, 27 Kan. 544. Again, it is said that "No damages can be recovered for a shock and injury to the feelings and sensibilities, or for mental distress and anguish caused by a breach of a contract, except a marriage contract." Russell v. Western Union Tel. Co., 3 Dak. 315. So, in Relle v. Western Union Tel. Co., 55 Tex. 308; s. c., 40 Am. Rep. 805, it was held that a telegraph company is liable for injury to the feelings of a son caused by its neglect to deliver to him a message announcing the death of his mother, whereby he is prevented from attending her funeral. But this decision, which was pronounced by a commission of appeals, was overruled by the supreme court of the same State in the subsequent case of Gulf, etc. R. Co. v. Levy, 59 Tex. 563; s. c., 46 Am. Rep. 278. This last decision seems to be overruled and the former reinstated by the later case of Stuart v. Western Union Tel. Co., 66 Tex. 580; s. c., 59 Am. Rep. 623, although the court attempt to say that the two cases were in conflict only on the single point that injury to the feelings alone would sustain such an action. In Logan v. Western Union Tel. Co., 84 Ill. 468, which was an action by a father against a telegraph company for negligence in failing to deliver a telegram sent by him to his son, summoning him to the death-bed of his mother, it was held that the plaintiff was entitled to recover at least nominal damages, including the price paid the company for sending the message, but nothing beyond this was considered. In Wymann v. Leavitt, 71 Me. 227; s. c., 36 Am. Rep. 303, which was an action for damages for injury to real estate by blasting rocks, it was held that the mental anxiety of the plaintiff for the safety of herself and family was not a proper element of damages. A tendency is observed on the part of the courts to break away from this rule. Thus, in Tennessee, it has been lately held that where a person sent a telegram to the plaintiff, his sister, containing information of the serious illness of her brother, and subsequently another one informing her of his death; and by reason of the negligence of the company these dispatches were not delivered, whereby the brother was deprived of that attention at her hands which he would have received but for such negligence, and she

§ 6. *The Company must be Apprised of the Special Circumstances.*—As damages for mental suffering, injury to family affection and the like are given on the footing of compensation, the rule of Hadley v. Baxendale[9] applies in such a sense that the company, in order to be held liable for such damages, must have had notice, either through the wording of the dispatch or otherwise, of the special circumstance, in consequence of which a failure to transmit it seasonably and correctly will entail mental suffering; and such we find to be the law, as recognized in several decisions. The Supreme Court of Texas, in one case, proceeded on the view that the telegram must, to support an action for the recovery of such damages, disclose the relationship of the parties. Accordingly, it was held that a dispatch in the words, "Come on first train; bring Ferdinand; his father is very low," which was so delayed that the plaintiff's wife was unable to reach her father before his death, would not support an action for damages for the mental suffering of the plaintiff's wife.[10] But where the telegram read, "Billie is very low; come at once," this was held by the same court sufficient to advise the company of the consequences of failure to deliver the message so as to make it liable for damages consisting of mental suffering,[11]—the apparent distinction being that the word "father" is not sufficient to convey such information, while the word "Billie" is. Again, where the telegram is sent from A to B, their surnames being unlike,—reading, "Willie died yesterday evening at six o'clock; will be buried at Marshall Sunday evening,"—this was held not to import family relationship between Willie and B, so as to entitle B to damages for the outrage to his fraternal feelings in failing to hear of his brother's death in time to attend the funeral and condole with his sister.[12]

§ 7. *Further of this Subject.*—The same court, in a subsequent case, had before it a case of the non-delivery of a message which, without disclosing the relationship of the parties, stated that the person named was dying, and said "Come quick." Here the court took the more sensible view that such a message sufficiently disclosed its urgency without stating the relationship of the parties, and held that the addressee who, in consequence of the failure of the company to deliver it, had been prevented from being present at the death-bed of his brother, was entitled to damages for his mental suffering. In giving the opinion of the court, Henry, J., said: "When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest. It would be an unreasonable rule, and one not comporting with the uses of the telegraph, to hold that the dispatcher will be released from diligence unless the relations of the parties concerned, as well as the nature of the dispatch, are disclosed. When the general nature of

in consequence was unable to make preparations for his funeral—she was entitled to damages for the wrong and injury done to her affections and feelings. This decision seems to be squarely to the effect that injured feelings, without more, may in such a case be the basis of recovering substantial damages. Wadsworth v. Western Union Tel. Co., 86 Tenn. 695; S. C., 6 Am. St. Rep. 864 (Lurton and Folkes, JJ., dissenting). But there is a ground on which this decision is capable of being "distinguished," which is the ground on which Mr. Chief Justice Turney concurred, namely, that telegraph companies are liable in damages to the party aggrieved, under the statute of that State (Tenn. Code (T. & S. §§ 1321, 1323); (M. & V. §§ 1541, 1542), and that the statute does not discriminate between messages pertaining to matters of a pecuniary nature and those which are sent for the receiver's personal benefit, and which relate merely to domestic matters. In Chase v. Western Union Tel. Co., 44 Fed. Rep. 554, Mr. District Judge Newman cited the following authorities as denying the right to recover damages for mental suffering unmixed with any other element of damages: Russell v. Western Union Tel. Co., 3 Dak. 315; S. C., 19 N. W. Rep. 408; West v. Western Union Tel. Co., 39 Kan. 93; S. C., 17 Pac. Rep. 807; Gulf, etc. R. Co. v. Levy, 59 Tex. 542, 563; Wyman v. Leavitt, 71 Me. 227; Johnson v. Wells, 6 Nev. 224; Nagel v. Railway Co., 75 Mo. 653; Railway Co. v. Stables, 62 Ill. 313; Freese v. Tripp, 70 Ill. 503; Meidel v. Anthis, 71 Ill. 241; Joch v. Dankwardt, 85 Ill. 333; Porter v. Railway Co., 71 Mo. 83; Fenelon v. Butts, 53 Wis. 344; S. C., 10 N. W. Rep. 501; Ferguson v. Davis Co., 57 Iowa, 601; S. C., 10 N. W. Rep. 906; Stewart v. Ripon, 38 Wis. 584; Masters v. Warren, 27 Conn. 293; Blake v. Railway Co., 10 Eng. Law & Eq. 442; Lynch v. Knight, 9 H. L. Cas. 577; Burke v. Railway Co., 10 Cent. L. J. 48; Rowell v. Western Union Tel. Co., 75 Tex. 26; S. C., 12 S. W. Rep. 534; Thompson v. Western Union Tel. Co., 106 N. C. 549; S. C., 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634.

[9] 9 Exch. 341.

[10] Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217; S. C., 13 S. W. Rep. 70. It should be added that, under the Texas procedure, an action is properly brought by the husband alone for an injury to his wife.

[11] Western Union Tel. Co. v. Moore, 76 Tex. 66; S. C., 12 S. W. Rep. 949.

[12] Western Union Tel. Co. v. Brown, 71 Tex. 723; S. C., 10 S. W. Rep. 323; 2 L. R. A. 776.

the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the operator the relationship of the parties concerned, a more reasonable rule will be when the receiver of the dispatch desires information about such matters, for him to obtain it from the sender, and, if he does not do so, to charge his principal with the information that inquiries would have developed."[13] Turning to the other side of the picture, we find it held in Indiana, in a case where the telegraph company failed for twenty days to deliver the following message addressed by the plaintiff to the husband of his wife's sister,—"My wife is very ill; not expected to live," that the sender of the message, though suffering no pecuniary loss, is entitled to compensation for the mental anguish he suffered consequent on its non-delivery, as the message was notice to the company that mental anguish will probably come to some one if not promptly delivered.[14]

§ 8. *Further Views as to the Measure of Damages in Such Cases.*—It has been reasoned in a case where the message, alleged to have been delayed, informed the plaintiff of the probable death of his wife, that the recovery is measured by a proper compensation for the disappointment and anguish suffered by the plaintiff's inability to be with his wife before her death, no punitive damages, nor damages for the grief naturally arising from the wife's death being allowed.[15] Under the Code of Civil Procedure of Texas, a husband can sue for injuries of body and mind sustained by his wife on account of the failure of a telegraph company to deliver a message to summon a physician, but if he sues in right of his wife, he cannot recover on his own account for his own anxiety and sympathy.[16] In the same State a general demurrer to the petition, in an action for damages against a telegraph company is properly sustained, where the only damage sustained is the mental and physical suffering of the plaintiff and his wife, resulting from the defendant's failure to deliver a message relating to the health of the plaintiff's mother-in-law, his wife's mother.[17] Nor in such a case are damages for mere continued anxiety caused by such failure recoverable.[18] In a recent case in Tennessee, it appeared that, by reason of a telegraph company's negligent delay in the transmission and delivery to a sister of messages informing her of the serious illness, and, later, of the death of her brother, she was denied the opportunity of attending him and making preparations for his funeral, the damages might include such sum as will compensate for the grief, disappointment, and other injury to her feelings.[19] SEYMOUR D. THOMPSON.

St. Louis, Mo.

[13] Western Union Tel. Co. v. Adams, 75 Tex. 531; s. c., 6 L. R. A. 844; 12 S. W. Rep. 857.

[14] Reese v. Western Union Tel. Co., 123 Ind. 294; s. c., 24 N. E. Rep. 163; 7 L. R. A. 583.

[15] Beasley v. Western Union Tel. Co., 39 Fed. Rep. 181.

[16] Western Union Tel. Co. v. Cooper, 71 Tex. 507; s. c., 1 L. R. A. 728; 9 S. W. Rep. 598. That the wife is not a necessary party, the court cite Texas, etc. R. Co. v. Burnett, 61 Tex. 638; San Antonio, etc. R. Co. v. Helm, 64 Tex. 147.

[17] Rowell v. Western Union Tel. Co., 75 Tex. 26; s. c., 12 S. W. Rep. 534.

[18] *Ibid.* This unsatisfactory decision attempts, but without success, to distinguish the previous decision of the same court in Stuart v. Western Union Tel. Co., 66 Tex. 580.

[19] Wadsworth v. Western Union Tel. Co., 86 Tenn. 695; s. c., 6 Am. St. Rep. 864; 8 S. W. Rep. 574 (Lurton and Folkes, JJ., dissenting).

ALTERATION OF NOTE—BURDEN OF PROOF.

FRANKLIN V. BAKER.

Supreme Court of Ohio, May 5, 1891.

Where it is claimed by the defendant, in a suit upon a promissory note or similar instrument, that the note has been altered since its execution, the burden is upon him to prove that it was so altered; the presumption being, in the absence of anything to the contrary, that any alteration appearing on the face of the paper was made at or before the time of its execution.

MINSHALL, J.: The plaintiff, Franklin, brought suit upon a note claimed to have been made by D. M. Baker, deceased, for $2,000, dated April 5, 1882. The defendant denied the execution of the note. On the trial, the plaintiff, having introduced proof of the genuineness of the maker's signature, offered the note in evidence, which was admitted over the objection of the defendant. The plaintiff offered no other evidence. At the close of the evidence the defendant, claiming that the note had, as appeared from its face, been altered, asked the court to charge the jury that if they "find from an inspection of the note that there have been suspicious alterations as to the date and amount, or either, and such alterations have not been satisfactorily explained by the plaintiff, he is not entitled to a verdict." This the court re-

fused, and thereupon charged the jury that an alteration would not invalidate the note unless made after its execution, and that for the purposes of a defense the burden was on the defendant to prove that it was so altered. Whether the note has been changed at any time is not clearly apparent from the face of it. The only claim of the defendant is that an apparent blurring indicates that the figures "5" and "82" in the date "April 5, 1882," have been changed from the figures "4" and "79," respectively, and that there are some indications that the amount, "twenty-one hundred," written in body of the note, has been changed from "ten hundred" or "twelve hundred," and that a corresponding change has been made in figures standing for the amount on the margin of the note. A photographic copy is inserted in the bill of exceptions, and from this it would be difficult to say whether it suggests any change to have been made in the note before or after its execution. But conformable to the charge of the court, and the view we take of the case, the note may appear on its face to have been changed at some time after it had been written, without affecting its validity; for, if it appears to have been changed, then the question arises whether it was so changed after or before it was executed and delivered. If before, that would not affect its validity. Such changes are frequently made, more frequently now, that when men of business had less skill, and employed others to do for them what they do now as a matter of every day's practice for themeselves. But if the change was made afterwards and without the consent of the maker, the alteration constituted a crime, which the law never presumes in the absence of proof. The only presumption the law indulges in such cases is in favor of the honesty and good faith of what appears to have been done. Hence it was the duty of the jury to presume, until the contrary appeared, that any erasure or interlineation to be found on the note had been made before the note was executed, since that presumption not only consists with the integrity of the party who made it, but is conformable to human experience, at this day, of the connection between such changes to be found in promissory notes and other written instruments, and the time when they were made. Wilson v. Hayes, 40 Minn. 531, 536, 42 N. W. Rep. 467.

We do not see that the defendant's request, the refusal of which is assigned for error, was any more proper than saying to the jury that the burden is on the plaintiff in any case to explain an alteration in the paper sued on, where it is apparent that a change has been made. How can it be determined, from a simple "inspection of the note," that an alteration was made after the signature to it? It may satisfactorily show, as in the case of an erasure or interlineation, that it was changed after it had been written; but to assume that such change was made after the note was made and delivered, without any extrinsic proof, is to presume, without evidence, that the change was fraudulently made, when, as a matter of fact, the chances are more than equal that it was made at or before the execution and delivery of the instrument, and to conform it to the intention of the parties. The cases elsewhere are not uniform on the subject. Some hold that alterations apparent on the paper must be explained by the party producing it, and, in the absence of such explanation, they are presumed to have been made after the execution of the instrument, and so fraudulent. This, it would seem, was the earlier rule at common law as to deeds and similar instruments; but its inconvenience was such as to cause it to be abandoned as early as the time of Lord Coke. And the rule as to such instruments in England, and generally in this country, is, if nothing appears against the alteration, to presume that it was made at the time of making the deed, and not after. Bailey v. Taylor, 11 Conn. 531, 534; Speake v. U. S., 9 Cranch, 37; Wickes v. Caulk, 5 Har. & J. 41; Hanrick v. Patrick, 119 U. S. 156, 172; Little v. Herndon, 10 Wall. 27, 31. In the latter case, cited with approval by Justice Matthews in the preceding case, Justice Nelson said: "In the absence of any proof on the subject, the presumption is that the correction was made before the execution of the deed. In a recent case in the queen's bench, Lord Cambell, C. J., in delivering the opinion of the court, after referring to the note in Hargreve & B. Co. Litt. 225*b*, where the rule was asserted, observed: "This doctrine seems to rest on principle. A deed cannot be altered, after it has been executed, without fraud or wrong; and the presumption is against fraud or wrong." Doe v. Catomore, 16 Adol. & E. (N. S.) 745.

In England a different rule has been adopted as to commercial paper; but, as clearly pointed out in Bailey v. Taylor, *supra*, and in Beaman v. Russell, 20 Vt. 205, this results from the provisions of their stamp act. There, as said by Hall, J., in the case last cited: "Any material alteration of a bill, after it has issued, or, in other words, after it is in the hands of a party entitled to make a claim upon it, is held to make a new bill of it, rendering a new stamp necessary. Under the stamp act, any alteration renders a bill void that would make it void at common law; and it may be void under that act, though otherwise perfectly valid. For the consent to the alteration by the party sought to be charged makes the bill valid at common law; but, under the statute, the consent of the parties to the bill is of no importance. If the bill be altered after it issues, no matter by whom, it becomes another bill, and requires a new stamp in order to make it evidence." It is evident that decisions based upon considerations not applicable to our own country are entitled to no weight as authority in its courts, and that the decisions of courts in this country in which those decisions have been simply followed as precedents are entitled to no greater weight; and an examination will show that they have been disregarded by courts of distinction about as often as they have been followed. In Bank v. Hall, 6 N.

J. Law, 215, a new trial was awarded by the Supreme Court of New Jersey, after a full argument for the misdirection of the court on the trial, in charging the jury that the plaintiff was bound to account for an alteration on the note, and, unless it was shown to have been made before the execution of the note, the law presumed it to have been done afterwards. So in Good v. Bryant, 13 Me. 386, it was held that the alteration of a figure in the date of a note proved only by inspection, is not of itself evidence that the alteration was made after the signature and delivery. To hold otherwise the court said, "would be a harsh construction, exposing the holder of a note, the date of which had been so altered as to accelerate payment, or to increase the amount of interest, to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law, when there would be, at least, an equal probability of innocence." In Odell v. Gallup, 62 Iowa, 253, 17 N. W. Rep. 502, it was held that the defendant in a suit on a promissory note, who alleges that it has been altered since its execution, has the burden of proof to establish the alteration. It is true that, in this case, the court entered into no discussion of the question and cited no authority to the point, and for the reason probably that it appeared too plain on principle to require it to do so. In Neil v. Case, 25 Kan. 510, the court without laying down any definite rule upon the subject said; "If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument." In Bailey v. Taylor, 11 Conn. 531, where the question was elaborately considered, the rule is stated as follows: "Where there in an alteration in an instrument under which a party derives his title, apparently against the interest of that party, the law does not so far presume that it was improperly made as to throw upon him the burden of accounting for it; but the jury are, from all the circumstances before them, to determine whether it was made before or after the execution of the instrument; and if after, whether it was with or without the assent of the adverse party, and, consequently, whether it rendered the instrument invalid or not." In Wilson v. Hayes, 40 Minn. 531, 42 N. W. Rep. 467, the question was considered by Mitchell, J., upon principle, and the conclusion reached, in a carefully prepared opinion, that there is no ground for any distinction, as to the rule of evidence in regard to an alteration, between negotiable paper and other instruments; and he observes that the tendency of many of the late American authorities is to repudiate any such distinction. The judgment below was reversed for the error of the court in saying to the jury that the presumption was that an alteration apparent on the note was made after its execution, and that the burden was on the plaintiff to remove this presumption. See, further, Printup v. Mitchell, 17 Ga. 558; Davis v. Jenney, 1 Metc. (Mass.) 221; Gorden v. Robertson, 48 Wis. 493, 496, 4 N. W. Rep. 579; Rankin v. Blackwell, 2 Johns. Cas. 198. The case of Huntington v. Fitch, 3 Ohio St. 445, is not in point. There the only question was as to the materiality of the change that had been made in the note—the erasure of the name of the surety. The facts were not in dispute. The court simply held that the erasure of the name of the surety, at his request and with the permission of the payee, did not affect the rights of the principal, and so did not amount to such an alteration as would invalidate the note. The observations of the court may, conformably to a view taken by many courts at that day, indicate an opinion that the burden of explaining what are termed alterations of a suspicious character is on the plaintiff. But no such question was before the court, and its remarks should be confined to the case it had under consideration.

The character of an alteration may be such as, in connection with other circumstances, would persuade the mind that it had been fraudulently made after the execution of the instrument. But no such inference should be drawn from an alteration standing alone, however apparent upon the face of the paper. There is no sounder principle applied by the law to the affairs of men than that which assumes what appears to have been done was done with a proper motive and conformably to its requirements, until the contrary appears; and the reason is that the assumed fact is generally found to conform to the truth. It is true that we are without any definite statistics, but, the low estimate of our race entertained the pessimist aside, we may safely trust our own observation and experience for the assertion that ninety and nine alterations to be found on the face of written instruments were lawfully and properly made for every one that had its origin in a fraudulent purpose. The law in its wisdom, trusts much to the general honesty of men; indeed, if human depravity were such that it could not—if honest men were the exception and rogues the rule—civil government would be impossible. Therefore the question as to when an alteration was made in a written instrument is one in fact, to be determined from a consideration of the circumstances; and, where it claimed to have been made for a fraudulent purpose, the burden, of establishing the fact must, according to the reason and analogies of the law, be upon the party who asserts it. It is argued that this is unfair to the representatives of a deceased maker of a note, whose mouth is closed by death, but we fail to perceive that the opposite rule would be any less so to the other party, whose mouth, as a witness, is also closed in such case. Judgment of the circuit court reversed and that of the common pleas affirmed.

NOTE.—Alterations of instruments are material or immaterial. The former is such a change, by writing upon or erasing from the paper, as causes it to have a different legal effect from the original. But it must

be in a material part of the instrument and affect the rights and liabilities of the parties thereto. Blair v. Bank of Tennessee, 11 Humph. 84; Newell v. Mayberry, 3 Leigh. (Va.) 250; Wheelock v. Freeman, 13 Pick. 165; Inglich v. Breneman, 5 Ark. 377; Oliver v. Hawley, 5 Neb. 439; Morrill v. Otis, 12 N. H. 466. The immaterial change, on the other hand, is one that does not affect the legal sense of the instrument, and therefore cannot avoid it. Burlingame v. Brewster, 79 Ill. 515; State v. Riebe, 27 Minn. 315; Robertson v. Hay, 91 Pa. St. 242; Bacheller v. Priest, 12 Pick. 399; Nickerson v. Swett, 135 Mass. 514; Kline v. Raymond, 70 Ind. 271; Harvester Company v. McLean, 57 Wis. 258; Burkholder v. Lapp, 31 Pa. St. 322; Block v. Cobb, 64 Ala. 127; Littlefield v. Coombs, 71 Me. 110; Commonwealth v. Emigrant's Bank, 98 Mass. 12; Reed v. Roark, 65 Am. Dec. 127; Whittlesey v. Frantz, 74 N. Y. 456; Murray v. Graham, 29 Iowa, 520; McRaven v. Crisler, 53 Miss. 542; McMichael v. Bankston, 24 La. Ann. 451; Gordon v. Sizer, 39 Miss. 818; White v. Fox, 29 Conn. 570. This rule is the same, according to some decisions, even though the person making the alteration did it with a fraudulent intent. Booth v. Powers, 56 N. Y. 22. But the contrary was held in Morrison v. Garth, 78 Mo. 434; German Bank v. Dunn, 62 Mo. 79; Turner v. Billagram, 2 Cal. 523; see also Williams v. Jansen, 75 Mo. 681.

The material alteration, if made by one of the parties to the instrument and without the other's authority or consent, will invalidate it as to him. Richmond Manufacturing Co. v. Davis, 7 Blackf. (Ind.) 412; Dietz v. Harder, 72 Ind. 208; Boston v. Benson, 12 Cush. 61; Homer v. Wallis, 11 Mass. 309; Flint v. Craig, 59 Barb. 319; Osborn v. Van Houghton, 45 Mich. 444; Knoxville National Bank v. Clark, 51 Iowa, 264; Oakey v. Wilcox, 3 How. (Miss.) 350. And the intent need not be wrongful. Fay v. Smith, 1 Allen, 477; Murray v. Graham, 29 Iowa, 520. He will not be permitted to establish the original contract by other evidence to avail himself of the rights he had before the alteration. Dobyns v. Rawley, 76 Va. 534; Newell v. Mayberry, 3 Leigh. (Va.) 250; Pew v. Bank, 32 Kan. 518. But if the alteration, although material, is made by a stranger to the contract, it will not have the effect of invalidating the instrument. Cochran v. Nebeker, 48 Ind. 459; Hunt v. Gray, 35 N. J. L. 227; Bellows v. Weeks, 41 Vt. 590; Nichols v. Johnson, 10 Conn. 192; Ford v. Ford, 17 Pick. 418; Gordon v. Robertson, 48 Wis. 493; Neff v. Horner, 63 Pa. St. 327; Bridges v. Winters, 42 Miss. 135; Union National Bank v. Roberts, 48 Wis. 373; Bigelow v. Stilphen, 35 Vt. 521; Murray v. Graham, 29 Iowa, 520; Crockett v. Thomason, 5 Sneed. (Tenn.) 342, 344.

Oftentimes, when the materiality of the change is not in dispute or after it has been decided, the question arises that is considered in the principal case: "On whom does the burden of proof lie to explain an alteration in an instrument produced in evidence?" A number of decisions can be found in support of each of these propositions: 1. It is presumed, in the absence of any evidence, that the alteration was made before the delivery, and therefore requires no explanation. Doe v. Catamore, 16 Q. B. 745; Lutz v. Kelly, 47 Iowa, 307; Boothbey v. Stanley, 34 Me. 515; Paramore v. Lindsey, 63 Mo. 63; Beaman v. Russell, 20 Vt. 205; Munroe v. Eastman, 31 Mich. 283; Banks v. Lee, 73 Ga. 25; Holton v. Kemp, 81 Mo. 661. 2. The alteration raises a presumption that it was made after execution, and therefore requires some explanation. Cole v. Hills, 44 N. Y. 227; Kiser v. State, 13 Tex. App. 201; Organ v. Allison, 9 Baxt. 459; Van Horn v. Bell, 11 Iowa, 465; Millikin v. Martin, 66 Ill. 13; Burgwin v. Bishop, 91 Pa. St. 336. 3. No presumption is raised either way. 4. The alteration raises a presumption only when it is suspicious. Cox v. Palmer, 1 McCrary (U. S.), 431; Beaman v. Russell, 20 Vt. 205; Stoner v. Ellis, 6 Ind. 152; Farmers' Insurance Company v. Blair, 82 Pa. St. 33; Muckelroy v. Bethany, 27 Tex. 551; First National Bank v. Franklin, 20 Kan. 264.

In the case of Cox v. Palmer, McCrary, C. J., says: "I think that one rule governs in all of the cases, and it is this: If the interlineation is in itself suspicious, as if it appears contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution." But Judge Mitchell, in Wilson v. Hayes, 40 Minn. 532, in a carefully prepared opinion, finds fault with this "intermediate or compromise rule." He says it furnishes no definite rule by which to determine when the burden is on the holder to explain the alteration and when it is not. "Who is to determine, and by what test," he asks, whether the alteration is suspicious? And, if held suspicious, when must it be explained—before or after its admission in evidence?" The first question here raised does not seem to be burdened with difficulty. The court will, of course, determine it. When objection is made to the admission of the instrument, it will be examined by the judge, and will be held to be *prima facie* sufficient, unless the alteration is such as to excite his suspicion. This is a clear and just rule and easy of application. It seems far more reasonable than the two leading views on the subject, "that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and therefore that no explanation is required; and that the presumption of law in all cases, is that the alteration was made after delivery, and therefore the burden is on the holder to explain it." In either case, if no opposing evidence is offered, the jury are bound to find in favor of the presumption. Many such disputable presumptions are raised in the law, but where the question of innocent or guilty conduct is involved, the presumption should be in favor of innocence, save where public policy may require an exception. These presumptions are the result, in the common course of events, of a connection between certain facts or things, the one being ordinarily found to attend or be the effect of the other. It is therefore manifestly unreasonable to hold that every interlineation or erasure in an instrument was made after execution, and deny *prima facie* the right of the plaintiff to claim any legal rights under the altered instrument until he has rebutted the implication of the change having been fraudulently made. For instance, if the instrument is the obligation sued on, and as altered it corresponds to the allegation, and the allegation stands admitted in the pleadings, there would seem to be no reason for the court requiring an explanation before admitting the paper. If, on the other hand, the change is a material variance from the allegation, the alteration should be explained. Then again, if the alteration is not in a part of the instrument that makes it relevant to any object for which the writing is offered, in cases where the writing is not directly involved in the issue, the court would not consider it suspicious. And if the change is so made as to leave the original reading plain, and it is found that, though there is a consider-

able verbal change, the legal effect of the paper remains the same, the alteration is not suspicious in itself. Then the question as to whether a change producing a different legal effect, is favorable or unfavorable to the party presenting the instrument, and in whose handwriting it appears to be made, will be considered in determining whether it is suspicious or not. And again, if the alteration is made by erasure, obliteration, or otherwise to conceal the original reading, it may suggest a suspicion to the judicial mind. All these facts and other intrinsic evidence would be considered, under the rule above laid down, in determining whether or not the paper should be allowed in evidence without explanation of changes that have been made in it by erasure, writing over, or interlineation.

The rule has been repeatedly affirmed in this country, however, that where it appears on the face of a written instrument, especially a will or negotiable note, that a change has been made in it, the burden of proof is on the party seeking to enforce or recover on the instrument to explain the alteration. Hodnett's Adm'rs v. Paces' Adm'rs, 6 S. E. Rep.217; Croswell v. Labee, 16 Atl. Rep. 330; Hill v. Nelms, 5 South. Rep. 766. But the tendency of recent decisions, it may be fairly said, is to put alterations of all kinds of instruments on the same basis, and to declare that if any presumption is raised by such alterations, it is raised by the suspicious character of the changes. Yet the great weight of authority is still in favor of the rule requiring an explanation of any material alterations in a promissory note or other negotiable instrument. Bank v. Clark, 1 N. W. Rep. 491; Horn v. Bank 4 Pac. Rep. 1022. These alterations have been held to be material, and to require explanation: Changing the date of the note. Wood v. Steele, 6 Wall. 80; Owings v. Arnot, 33 Mo. 406. Writing "waiver, notice and protest" over an indorsement in blank. Davis v. Eppler, 16 Pac. Rep. 793. Alteration of agreement as to interest. Weyerhauser v. Dun, 2 N. E. Rep. 274; Harsh v. Klepper, 28 Ohio St. 200; Lee v. Starbird, 55 Mo. 491; Hart v. Clouster, 30 Ind. 210; Washington Savings Bank v. Ecky, 51 Mo. 272; Coburn v. Webb, 56 Ind. 96; McGrath v. Clark, 56 N. Y. 34. An alteration in the name of the payee. Stoddard v. Penniman, 108 Mass. 366; Davis v. Bauer, 41 Ohio St. 257; Bell v. Makyn, 29 N. W. Rep. 341; Broughton v. Fuller, 9 Vt. 373. Cutting off a memorandum which forms part of the note. Davis v. Henry, 14 N. W. Rep. 523; Stephens v. Davis, 85 Tenn. 271; Gerrish v. Glines, 56 N. H. 9; Wait v. Pomeroy, 20 Mich. 425; Benedict v. Cowden, 49 N. Y. 396. The addition of new sureties without the consent of the original party. McVean v. Scott, 46 Barb. 379; Bowers v. Briggs, 20 Ind. 139. Inserting, striking out or changing the place of payment. Charleton v. Reed, 16 N. W. Rep. 64; Nazro v. Fuller, 24 Wend. 374; Woodworth v. Bank of America, 19 Johns. 391; Townsend v. Wagon Company, 7 N. W. Rep. 274; Southwark Bank v. Gross, 35 Pa. St. 80. Changing indorser into guarantor. Belden v. Harm, 15 N. W. Rep. 591. Changing the words "or order" to "or bearer," or adding words of negotiability. Needles v. Shaffey, 14 N. W. Rep. 129; Belknap v. Bank of North America, 100 Mass. 376; Haines v. Dennett, 11 N. H. 180; Booth v. Powers, 56 N. H. 22. The addition of the name of a maker to an instrument already signed by several makers. Singleton v. McQuerry, 2 S. W. Rep. 652; Mersman v. Werges, 112 U. S. 139; Hamilton v. Hooper, 46 Iowa, 515; Wallace v. Jewell, 21 Ohio, 163; Sullivan v. Rudisill, 18 N. W. Rep. 856. Adding words expressing a consideration. Low v. Argrove, 30 Ga. 129.

The following alterations have been held to be immaterial: Payee signing notes as security, and afterwards erasing his name and indorsing them. Lynch v. Hicks, 4 S. E. Rep. 255. Figures in the margin of a note may be changed without vitiating it. Harvester Company v. McLean, 15 N. W. Rep. 177. Insertion of words "or bearer" after the note was executed. Weaver v. Brombey, 31 N. W. Rep. 839. Filling certain blanks. Bank v. Carson, 27 N. W. Rep. 589; Lowden v. Schohaid County National Bank, 16 Pac. Rep. 748; Briscoe v. Reynolds, 2 N. W. Rep. 529; Rowley v. Jewett, 9 N. W. Rep. 353; Canon v. Grigsby, 5 N. E. Rep. 562. Contrary, see Hooper v. Collingwood, 10 Colo. 107. Erasure of words "renewal" or "renewal by another note." Marrow v. Richardson, 6 S. W. Rep. 763. Payee writing in note an extension of time. Drexler v. Smith, 30 Fed. Rep. 754. Obtaining the signature of another man as co-surety. Ward v. Hackett, 14 N. W. Rep. 578. See McVean v. Scott, 46 Barb. 379. Indorsing on back of note "payable at K." Horton v. Horton, 71 Iowa, 448. A stranger signing a note as a witness. Church v. Towle, 142 Mass. 12. An indemnity bond was changed and the alteration restored, no fraud being shown, it was held not to avoid the bond. Rogers v. Shaw, 59 Cal. 260. Defacing the seal of a bond will not invalidate it. Evans v. Williamson, 79 N. C. 86. Nor will an alteration of an instrument by an officer who is merely the custodian of it. State v. Berg, 84 Ind. 183.

An alteration made by consent of the parties will not invalidate the instrument; but all parties to the contract must consent to the change. Cannon v. Grigsby, 116 Ill. 151; Britton v. Stanley, 4 Wheat. (Pa.) 114; Briggs v. Glenny, 7 Mo. 572; Boston v. Benson, 12 Cush. 61; Stiles v. Probst, 69 Ill. 382; Toomer v. Rutland, 57 Ala. 379; Long v. Mason, 84 N. C. 15; Swift v. Barber, 28 Mich. 503; Lemay v. Johnson, 35 Ark. 225.

JETSAM AND FLOTSAM.

"RATS" IN THE LAW OF TORTS.—The CENTRAL LAW JOURNAL contains two answers to the question we asked in the May number, as to what case the student had in mind when he mentioned "rats" along with the act of God and the public enemy as exceptions to the rule in Fletcher v. Rylands. G. H. W., of Cincinnati, answers rightly, Carstairs v. Taylor, L. R. 6 Ex. 217, and the editor, taking the matter seriously, says: "Though as a matter of humor the exception may be so stated, it is in no sense correct," and he proceeds to show that any other *vis major* as well as rats would have relieved the defendant from liability, especially if the artificial work which was the source of the danger, were maintained for the benefit of both parties; all of which is quite true. Another correspondent, B. K. Miller, Jr., of Milwaukee, says, "the case which the student had in his mind may have been of the following: 18 Chicago L. N. 158; 20 Am. L. Rev. 247; L. R. 16 Q. B. Div. 629; L. R. 17 Q. B. 670; 23 Cent. L. J. 218; 37 Alb. L. J. 137; 21 Chicago L. N. 449; 39 Fed. Rep. 562." Carstairs v. Taylor, L. R. 6 Ex. 217, is not referred to. It would seem that rats run all through the cases.—*New Jersey Law Journal.*

BOOKS RECEIVED.

NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION AS TO THE LAW, EVIDENCE, PLEADING, PRACTICE, FORMS AND THE EVIDENCE OF MARRIAGE IN ALL ISSUES, on a new system of Legal Exposition. By Joel Prentiss Bishop, Honorary Doctor Juris Utriusque of the University of Berne. In two volumes, Vols. I and II. Chicago: T. H. Flood & Company, Law Publishers. 1891.

THE LAW OF LIFE INSURANCE, Including Accident Insurance and Insurance by Mutual Benefit Societies. By Frederick H. Cooke, of the New York Bar. New York: Baker, Voorhis & Co., Publishers, 66 Nassau Street. 1891.

A MONOGRAPH ON THE LAW OF LOST WILLS. By W. W. Thornton, Author of Juries and Instructions, etc. Chicago: Callahan & Company. 1890.

THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS. Compiled from the Talmud and other Rabbinical writings, and compared with Roman and English Penal Jurisprudence. By S. Mendelsohn, LL. D. Rabbi Conor, "Temple of Israel," Wilmington, N. C. Baltimore: M. Curlander, Law Bookseller and Publisher. 1891.

LAWYERS' REPORTS, ANNOTATED. BOOKS IX AND X. All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Burdett A. Rich, Reporter. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1891.

VESTED RIGHTS. Selected Cases and Notes on Retrospective and Arbitrary Legislation Affecting Vested Rights of Property. By William G. Myer, Editor of "Myer's Federal Decisions." St. Louis, Mo. The Gilbert Book Company. 1891.

A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS, including Bills of Exchange, Promissory Notes, Negotiable Bonds and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit, and Circular Notes. By John W. Daniel, of the Lynchburg (Va.), Bar. In two volumes. Vols. I and II., fourth edition. New York: Baker, Voorhis & Co., Publishers, 66 Nassau Street. 1891.

QUERIES ANSWERED.

QUERY NO. 10.

[*To be found in Vol. 32, Cent. L. J. p. 473.*]

Your query would be easy of solution under the Texas laws, as to limitation of notes. See § 1050, Randolph on Commercial paper. But stripped of all limitation, if the mortgage contains a power of sale, then though all the notes may be barred by limitation, yet under the power of sale, if the maker of power be alive the sale can be had. See 67 Texas, 275, also Goldfrank v. Young, 54 Texas. If you are for foreclosure you are all right, if adverse to foreclosure you had better stand from under. M. R. G.

HUMORS OF THE LAW.

"Suppose I show, your Honor, that I am a counselor of the Supreme Court of the United States," said the lawyer, trying to placate the country Solon.

"Now, let me tell you," said the judge, "that you must be a counselor-at-law from the State of New Jersey before you can practice here.—*New Jersey Law Journal.*

Magistrate—"Nightwatchman Smith, the accused, declares he made no noise or disturbance."

Nightwatchman Smith—"Yes, he did; he made so much it woke me up."—*Fluegende Blaetter.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT STATED—Balance.—In an action for the balance of an account, where plaintiff relies merely on defendant's express promise to pay it, defendant cannot surcharge the account of which the item is a balance, for the mere purpose of showing it incorrect.—*Hawley v. Harran*, Wis., 48 N. W. Rep. 676.

2. ADMINISTRATOR—Waiver of Rights as Pledgee.—The defendant was administrator of the estate of an intestate. He held a note and mortgage, which had belonged to the intestate, and which the latter had pledged to the defendant as collateral security for a debt owing to him. As administrator he treated the note and mortgage as belonging to the estate, without asserting his right to hold the same for his personal benefit, and proceeded to foreclose the mortgage in behalf of the estate. *Held*, that he effectually waived his personal right as a pledgee.—*Lewis v. Welch*, Minn., 48 N. W. Rep. 608.

3. AFFIDAVIT.—A statement to the effect that defendant is too sick to leave his bed, that his testimony is material, and that his attorney cannot safely go to trial without him, is insufficient to require a continuance, where it is not made under an oath, and does not contain a statement of the facts to be proven.—*McGrath v. Tallent*, Utah, 26 Pac. Rep. 575.

4. APPEAL—Review—Objections not Raised Below.—Where on the trial of a cause the plaintiff is permitted to amend his petition setting up a new cause of action, and the defendant does not object to it on that ground in the trial court, he cannot in this court assign the allowance of such amendment as error, and have the

matter reviewed here, though he did object to the allowance of such amendment on other grounds.—*Parsons Water Co. v. Hill*, Kan., 26 Pac. Rep. 412.

5. APPEAL—Demurrer.—An order sustaining a demurrer to a declaration, and dismissing it with costs, unless the plaintiff amends and pays an attorney's fee within a specified time, is not appealable until after the time limited for amendment.—*Claak v. Village of North Muskegon*, Mich., 48 N. W. Rep. 647.

6. APPEAL FROM SETTLEMENT OF ESTATE.—A woman was divorced from her husband, and married again. Seven months after the divorce, and four months after her second marriage, she gave birth to respondent, and afterwards died. On final settlement of her estate, her land was assigned to respondent and a younger child of the second marriage, subject to the second husband's curtesy. Respondent and her guardian were both ignorant of this assignment, and failed to appeal therefrom within the time allowed by law, but they afterwards petitioned for leave to the take appeal. *Held*, that leave should be granted.—*Schuman v. Hurd*, Wis., 48 N. W. Rep. 672.

7. APPEAL—Jurisdiction—Freehold.—A bill for partition alleged that one of the defendants claimed to have some interest in the land, but that said interest was of no validity, and prayed that such claim be removed as a cloud on complainant's title. Said defendant answered claiming title to the entire premises by virtue of 20 years' adverse possession, and the decree found that said defendant had no interest in the land. *Held*, that the suit involved a freehold within the meaning of the Illinois statute regulating appeals.—*Wilson v. Dresser*, Ill., 27 N. E. Rep. 586.

8. APPEAL BOND—Condemnation.—A bond on appeal to the district court from the award of commissioner in condemnation proceeedings under the mill-dam act may be approved by a court commissioner, although the statute prescribes that it shall be approved by the judge of the district court.—*Hemstead v. Cargill*, Minn., 48 N. W. Rep. 686.

9. APPEAL—Probate Proceedings.—The provision in Code Civil Proc. Cal. § 963, subd. 2, authorizing an appeal to be taken to the supreme court from a superior court "from an order granting or refusing a new trial," embraces such orders made in probate proceedings, as well as those made in civil actions.—*In re Bauquier's Estate*, Cal., 26 Pac. Rep. 532.

10. APPEAL—Time of Filing.—Code Wash. T. 460, which requires causes to be filed on appeal 15 days before the first day of the next succeeding term of the supreme court, is nullified by Const. Wash. art. 4, § 2, which provides that the supreme court shall always be open for the transaction of business, except on non-judicial days; thus abolishing terms.—*Skagit, Railway & Lumber Co. v. Cole*, Wash., 26 Pac. Rep. 535.

11. APPEAL—Record.—The appellate court cannot consider the evidence when the bill of exceptions merely recites that it contains "all the testimony given to the jury."—*Sanford Tool & Fork Co. v. Mullen*, Ind., 27 N. E. Rep. 448.

12. APPEALABLE ORDER.—Defendant agreed to properly care for plaintiff's herd of cattle, and at the end of five years deliver to plaintiff double the number received. In an action for breach, a decree was entered appointing a receiver to take the cattle and the progeny, cause them to be put in condition for market, sell the same, and bring the proceeds into court, and providing for a personal decree against defendant for any deficiency. *Held*, that it is an interlocutory order, and not a final decree, fixing an amount due, from which appeal can be taken.—*Webber v. Randall*, Mich., 48 N. W. Rep. 617.

13. ARREST—Justice's Court—Affidavit.—Under Code Civil Proc. Cal. §§ 861, 862, an affidavit for arrest, which shows that an action has been begun for the recovery of an "alleged" indebtedness owing by defendant, but which contains no averment that such indebtedness or cause of action exists, is fatally defective.—*In re Vinich*, Cal., 26 Pac. Rep. 529.

14. ASSAULT AND BATTERY—Evidence.—In an action for damages for assault and battery the evidence showed that defendant had struck plaintiff on the nose, and so injured it that he could not breathe freely through one nostril. Plaintiff testified that when he caught cold he was unable to breathe through the other nostril, and a physician testified that such would be the effect of a cold. *Held*, that it was competent for plaintiff to ask the physician, as an expert, what would be the probable effect if plaintiff should be unable to breathe through his nose.—*Morganstein v. Nejedlo*, Wis., 48 N. W. Rep. 652.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—A deed of assignment for the benefit of creditors, reciting as facts the conditions which would justify an assignment under the insolvent law of 1881, and providing for distribution to "creditors who shall file releases of their debts as by law provided," *held* to be be on its face a valid assignment under that statute.—*Smith v. Bean*, Minn., 48 N. W. Rep. 687.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for benefit of creditors, preferring certain creditors holding chattel mortgages, is not rendered void by the fact that the mortgages though good as to the assignors, were invalid as to other creditors because of non-filing.—*Kitchen v. Lowry*, N. Y., 27 N. E. Rep. 357.

17. ATTACHMENT—Directing Verdict.—In trespass against a sheriff for attachment and sale of plaintiff's goods as the property of another it was not error to direct the jury to find for plaintiff if they believed the evidence when it clearly showed that he was the sole owner.—*Smith v. Marx*, Ala., 9 South. Rep. 194.

18. ATTORNEY'S LIEN.—An attorney having taken no steps to perfect a statutory lien on a judgment obtained by him, and the statute of limitations having run against his action at law, he cannot sue in equity to establish a lien on the judgment for services rendered under an agreement that they should be paid for out of any judgment obtained.—*McNagney v. Frazer*, Ind., 27 N. E. Rep. 431.

19. BANKS—Collections—Garnishment.—Generally the payee of a bill of exchange, by indorsing it (otherwise in blank) "For deposit to the credit of" himself retains ownership not only of the bill, but of its proceeds, until they are so deposited. The money realized by collecting the bill is, in the hands of a disinterested bank, through whose agency the collection was made subject to garnishment as assets belonging to such indorser.—*Freeman v. Exchange Bank*, Ga., 13 S. E. Rep. 160.

20. CARRIERS—Passengers—Negligence.—In an action for personal injuries sustained by plaintiff's stepping between the platform of the car and the platform of the station while alighting from the train, it is not admissible to show that at other stations on the same road similar accidents had happened, unless it first be shown that the conditions were similar, as that the distance from the car to the platform at such stations was the same as at the station in question.—*Brady v. Manhattan Ry. Co.*, N. Y., 27 N. E. Rep. 368.

21. CARRIERS—Live-stock.—In a suit against a railway company for damages to cattle shipped over its line, alleged to have resulted from the unnecessary delay in transportation, whereby the cattle were reduced and emaciated, so that plaintiff could not sell them for the price he had contracted for, but had to take a less price, there can be no recovery for such difference in price in the absence of any allegation that defendant was informed that the cattle were being shipped to fill a contract, or that it was important to have them at their destination at any given time.—*Gulf C. & S. F. Ry. Co. v. Cole*, Tex., 16 S. W. Rep. 176.

22. CARRIERS—Stock—Negligence—Pleading.—In an action against a railroad company for damages to stock which, through its negligence, died or were injured in course of shipment, the petition alleged that defendant failed to furnish food and water for unreasonable periods. *Held*, that it was not necessary to allege the

places on the road where defendant failed to feed and water.—*Gulf, C. & S. F. Ry. Co. v. Wilhelm*, Tex., 16 S. W. Rep. 109.

23. CHARITABLE BEQUESTS—Perpetuities.—A bequest for the endowment and maintenance of a non-existent musical college, to be incorporated by an act of legislature for which testator's executors, of whom there are four, are to apply upon his decease, void, since the power of alienation of the fund is thus suspended during the life of the longest liver of the four executors; the statute of New York limiting the power of alienation of property to two lives in being.—*People v. Simonson*, N. Y., 27 N. E. Rep. 880.

24. CHATTEL MORTGAGES—Record. — A parol agreement by a creditor to take removal notes for $6,500 if the debtor would pay $3,500 is not such a consummation of the renewal as will render an unrecorded chattel mortgage thereafter given by the debtor to a third person valid as against the notes which were executed in accordance with said agreement, but subsequent to the giving of said mortgage.—*Cutler v. Steele*, Mich., 48 N. W. Rep. 632.

25. CONSTITUTIONAL LAW—Local Acts.—Acts Ind. 1889, p. 276, which provides that county commissioners shall submit to a vote the question of purchasing toll road, whereby it becomes the duty of the board to make such purchase, issue bonds, and raise money to meet same by taxation upon the property in towns voting for the purchase, is uniform in its operation throughout the State, and applies alike to all persons within its operation, and is not in conflict with Const. Ind. art. 4, § 22.—*Gilson v. Board of Com'rs*, Ind., 27 N. E. Rep. 235.

26. CONSTITUTIONAL LAW — Elections — Tie Vote.—A statutory provision (Rev. St. Ind. 1881, § 4736) that when in any election there is a tie vote the judges of election shall determine by lot to which of the opposing candidates the certificate of election should be given, is not in violation of Const. Ind. art. 2, § 13, providing that all elections shall be by ballot, since it deprives no elector of his vote, and gives to each vote its full force and weight.—*Johnston v. State*, Ind., 27 N. E. Rep. 422.

27. CORPORATION—Marshalling Assets.—In an action to marshal the assets of a corporation, to require the stockholders of an insolvent corporation to pay unpaid subscriptions, and to restrain the enforcement of a material-man's lien, creditors holding mortgage and vendors' liens were made defendants. It appeared that A, one of the creditors, had furnished the corporation with supplies upon an agreement with B, who held a mortgage on the corporate property, that the latter would not enforce his lien until A was paid: *Held*, that A acquired no lien on the property as against the corporation, and his claim of priority as against B, involved no controversy with the other creditors.—*Warren v. Wetumpka Lumber Co.*, Ala., 9 South. Rep. 186.

28. CORPORATIONS—Power to Hold Land.—Under the act of February 28, 1877, providing that the State of Georgia will not consent to foreign corporations owning 5,000 or more acres of land in this State, unless they shall become incorporated under the laws of Georgia, the State alone can make the question as to the right of such corporations to hold said land. — *American Mortgage Co. of Scotland v. Tennille*, Ga., 13 S. E. Rep. 158.

29. COSTS—Partition.—Under How. St. Mich. §§ 7897, 7898, 7907, 7917, providing for the allowance to complainant of "costs and expenses," and "costs and charges" in partition, reasonable allowance for the services of complainant's solicitor above taxable costs is authorized.—*Greusel v. Smith*, Mich., 48 N. W. Rep. 616.

30. COSTS—Witness' Fees.—A party plaintiff is not compelled to discharge his witness when he has rested his case, but may properly wait until the evidence on both sides is all in, especially when defendant has put in affirmative answers in support of which he proceeds to offer proof, and which may require evidence in rebuttal, and an order taxing plaintiff with the cost of holding his witnesses over till the close of the evidence is error.—*Deweese v. Smiley*, Ind., 27 N. E. Rep. 445.

31. COUNTY TREASURER—Bond.—As the judicial power of the territory of Washington was by its organic act vested in a supreme court, district and probate courts, and justices of the peace, the board of county commissioners has no judicial power, and in settling the treasurer's accounts it acts in a ministerial capacity, so that its decisions are not binding on the county.—*Ferry v. King County*, Wash., 26 Pac. Rep. 537.

32. CRIMINAL EVIDENCE—Homicide.—When part of a conversation or part of a transaction is put in evidence, the opposing party may rightfully call for the whole conversation or transaction, though the evidence was in the first place illegal.—*Gibson v. State*, Ala., 9 South. Rep. 171.

33. CRIMINAL LAW—Fraudulent Issue of Stock.—Under Rev. St. Ill. ch. 38, § 119, which makes the fraudulent issue of corporate stock a felony, a count charging that defendants did on a day named issue to one of the defendants four certain false certificates of ownership of the capital stock of a corporation, giving the name of the corporation and the number of shares represented by each certificate, sufficiently identifies the offense.—*West v. People*, Ill., 27 N. E. Rep. 34.

34. CRIMINAL LAW—Killing Trespassing Animals.—In a prosecution for wilfully killing swine, defendant may show that the hogs were in his field, destroying his corn, at the time they were killed.—*McMahan v. State*, Tex., 16 S. W. Rep. 171.

35. CRIMINAL LAW—Murder—Resisting Arrest.—As by Code Ga. § 4724, a private person may arrest one who has committed a felony, and is escaping or attempting to escape, and defendant knew deceased's purpose, his killing deceased, by resisting and shooting him, constituted murder.—*Snelling v. State*, Ga., 13 S. E. Rep. 154.

36. CRIMINAL PRACTICE — Theft— Ownership.—Where an indictment for the theft of a calf alleges that it was the property of A, there can be no conviction, if it is shown that the calf was not the property of A, or that it was the property of some other person.—*Clark v. State*, Tex., 16 S. W. Rep. 171.

37. CRIMINAL PRACTICE — Indictment — Election. — Where counts charging distinct felonies have been joined in an indictment the State will not be compelled to elect, unless it appears either from the indictment or the evidence that an attempt is made to convict of two or more offenses growing out of separate and distinct transactions.—*Butler v. State*, Ala., 9 South. Rep. 191.

38. CRIMINAL PRACTICE—Conviction of Lower Grade of Offense.—The defendant was indicted in a single count for murder in the first degree. On a first and second trial he was convicted of murder in the second degree, the verdict at both trials being silent as to the higher crime: *Held*, that this is tantamount to an affirmative acquittal of the higher offense.—*Johnson v. State*, Fla., 9 South. Rep. 208.

39. CRIMINAL TRIAL—Peremptory Challenges—Jurors. —Where a juror has been examined, found competent, and accepted by the State, defendant cannot, as a matter of right, examine him for the purpose of a peremptory challenge, if that course seems best; and the refusal of the court to allow such examination is therefore not reviewable, under Code Ala. §§ 2758, 4508.—*Lundy v. State*, Ala., 9 South. Rep. 189.

40. DESCENT AND DISTRIBUTION — Illegitimate Children—Mormons.—Act Utah 1852, § 25, permitting illegitimate children to inherit from the father, is valid under Act Cong. Sept. 9, 1850, providing that the legislative power of Utah shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of the act.—*In re Pratt's Estate*, Utah, 26 Pac. Rep. 576.

41. DITCH ASSESSMENT—Appeal — Where a railroad company, whose right of way crosses a previously established public ditch several times, fills it up in some places, and restores it to its full size and usefulness, by constructing it along its right of way a certain distance,

and the county surveyor, under Drainage Act Ind. 1885, § 10, authorizes him to clean out and restore ditches, and assesses the cost against the land originally assessed for the construction of the ditch, cleaned out the ditch, and assessed a portion of the expense against the company, the only remedy of the latter is by appeal.—*Terre Haute, etc. R. Co. v. Soice*, Ind., 27 N. E. Rep. 429.

42. DOWER.—In a proceeding for assignment of dower in lands belonging to plaintiff's first husband it appeared that plaintiff and her present husband had sold and conveyed all her title and interest therein to one of defendants, who was one of her deceased husband's heirs, and that part of the purchase price had been paid: *Held*, that such conveyance defeated her right to have dower allotted.—*Brandon v. Wilkinson*, Ala., 9 South. Rep. 188.

43. EASEMENTS—Ways by Necessity.-Where a building was unfinished at the time the lessee sublet the first floor to defendant, and it was apparent that there was one stairway and elevator to reach the upper stories, defendant takes the first floor subject to a way by necessity for the lessee and his customers and goods to reach the upper floors, and he cannot claim any abatement of rent on account of defendant's use of the first floor for that purpose.—*Benedict v. Barling*, Wis., 48 N. W. Rep. 670.

44. EASEMENTS—Fencing Right of Way.—In trespass for tearing down a fence on the line of a private road, it appeared that plaintiff had acquired a statutory right of way 24 feet wide across one end of defendant's lands, and erected a fence along and within the boundary line, and had been accustomed daily to drive cattle and horses through the private road: *Held*, that the fence along the boundary dividing the road from defendant's land is an incident necessary to plaintiff's reasonable enjoyment thereof, and defendant was liable for destroying it.—*Harvey v. Crane*, Mich., 48 N. W. Rep. 582.

45. ELECTIONS— Rejection of Legal Votes. — Where qualified voters, after their names have been illegally stricken from the lists, tender their votes, with affidavits of their qualification, and the same are rejected, they cannot then be counted or made available in such a contest; the power of the court being restricted to the rejection of fraudulent votes actually cast, or to the rejection of the vote of a precinct, where it appears that such vote would change the result in the remaining vote of the county.—*Ferguson v. Allen*, Utah, 26 Pac. Rep. 570.

46. ELECTIONS—Certified Copy of List.—The chairman of the board of registration commissioners furnished to a candidate for office, at his request, a list of voters in the city of Memphis. Plaintiff paid the price asked under a protest that the amount was in excess of the fees allowed by law, and sued to recover so much as was thought unlawful: *Held*, that no duty was imposed upon the commissioner by statute to render the service, and no fee fixed by law, and the price to be paid therefor is a matter of contract.—*Garven v. Glisson*, Tenn., 16 S. W. Rep. 116.

47. EMINENT DOMAIN— Evidence — Jurisdiction.—In proceedings to condemn land for a right of way for a railroad, it is competent in ascertaining the damage to show the value of the land before the road was made across it, and the value when divided by the road into parcels.—*Evansville & R. R. Co. v. Swift*, Ind., 27 N. E. Rep. 420.

48. EQUITY—Foreclosure.—Courts of equity have jurisdiction, in proper cases, to afford relief where there has been an attempted foreclosure of a mortgage which is invalid because of a non-compliance with the statutory requirements, and a bill in equity may be brought by the purchaser for relief.—*Wolf v. Ward*, Mo., 16 S. W. Rep. 161.

49. ESTOPPEL BY ACCEPTANCE — Devise.— A woman owning jointly with her husband two lots of land, died intestate, leaving three daughters, who inherited her undivided one-half. The husband afterwards devised the lots to one daughter, as follows: "Lot number one, and the house thereon; also lot number two;" and to the other daughters he devised other real estate. *Held*, that the latter, by accepting the property devised, elected to take under the will, and were estopped from claiming any interest in the lots devised to their sister. —*Brossene v. Schmitt*, Ky., 16 S. W. Rep. 135.

50. EXECUTION—Claim of Exemption.—A writ of execution, issued on a judgment for the recovery of land, and for the collection of damages on account of its wrongful detention, is not subject to the claim of exemptions of personal property, under Code Ala. § 2511, and, this appearing upon its face, the sheriff has the right to disregard such a claim, and sell the property, as if no such claim had been interposed.—*Penton v. Diamond*, Ala., 9 South. Rep. 175.

51. EXECUTORS — Compensation— Services.— Unusual and extraordinary services of an executor, for which the court is authorized to allow compensation, are such services as are not ordinarily required of an executor, in the discharge of the duties of his trust.—*Steel v. Holladay*, Oreg., 26 Pac. Rep. 562.

52. EXEMPTION.—Under the rule that an exemption law must be liberally construed, a note which was exempt in the hands of a husband, as against a judgment recovered against him, will not become subject thereto by assignment to his wife, though execution had not been issued on the judgment, and claim of exemption was not made until after the wife sued on the note, and the judgment was pleaded as a set-off.—*Pickrell v. Jerauld*, Ind., 27 N. E. Rep. 432.

53. EXPERT TESTIMONY—Opinion Evidence.—Plaintiff, a pattern maker, sued to recover for services in making a machine for burning crude oil, alleging that he spent about 1,700 hours in getting up, designing, and drawing the devise. *Held*, that it was not a subject involving professional skill, so as to render the opinions of experts admissible as to whether 1,700 hours could be profitably spent in that manner.—*Trapp v. Dreucker*, Wis., 48 N. W. Rep. 664.

54. FEDERAL COURT—State Statute—Equity.—Pub. St. Mass. ch. 151, § 2, cl. 10, which confers equity jurisdiction in cases where "the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law," does not extend the jurisdiction of the federal courts even in suits removed from the State courts.—*Hunton v. Equitable Life Assur. Soc.* U. S. C. C. (Mass.), 45 Fed. Rep. 661.

55. FRAUDULENT CONVEYANCES—Setting Aside.—Code Ala. § 3544, which provides that a creditor without a lien may file his bill in chancery to subject to payment of his debt property which has been fraudulently conveyed, includes, as such creditor, the assignee of a judgment.—*Jones v. Smith*, Ala., 9 South. Rep. 179.

56. FRAUDS, STATUTE OF — Memorandum.—A written memorandum of a contract, whereby defendant agrees to sell plaintiff certain real and personal property, which names the parties and price, and gives a complete description of the property, and is signed by the defendant, who is the party to be charged, is not insufficient because it is not also signed by the plaintiff.—*Cavanaugh v. Casselman*, Cal., 26 Pac. Rep. 515.

57. FRAUDS, STATUTE OF—Lease.-Under Gen. St. Ky. ch. 22, § 1, providing that no action shall be brought "upon any contract for the sale of real estate, or any lease thereof for a longer term than one year," nor "upon any agreement which is not to be performed within one year from the making thereof, unless the promise be in writing," no action lies on an oral contract for the letting of land for a term of one year commencing two months after the date of the contract.—*Greenwood v. Strother*, Ky., 16 S. W. Rep. 138.

58. FRAUDS, STATUTE OF—Verbal Lease.-A verbal contract to lease property for one year commencing over three months *in futuro*, is within the statute of frauds. *White v. Levy*, Ala., 9 South. Rep. 164.

59. GARNISHMENT—Service of Writ.—Service of a writ of garnishment on the "manager" of a domestic corpo-

ration is not sufficient, under Sayles' Civil St. Tex. art. 1223.—*Tompkins Machine & Implement Co. v. Schmidt*, Tex., 16 S. W. Rep. 174.

60. GARNISHMENT.— Though money belonging to an estate in bankruptcy, in the hands of the clerk of the court as a master in chancery, to be held pending the settlement of the respective rights of the creditors by litigation, is in the custody of the court, and cannot be reached by garnishment, yet, where an order of distribution has been made, the rights of the respective creditors become in effect a debt due to each of them by the clerk, and a creditor of one of the creditors may levy upon it by garnishment.—*Dunsmoor v. Furstenfeldt*, Cal., 26 Pac. Rep. 518.

61. GARNISHMENT — Service by Publication. — Under Rev. St. Wis. § 2640, a judgment against garnishees cannot be rendered where, in the action against the original debtor, the order for service by publication and the affidavit recited defendant's residence as one place, and the order directed copies of the papers to be mailed to him addressed to a different place.—*Beaupre v. Keefe*, Wis., 48 N. W. Rep. 596.

62. GIFTS INTER VIVOS—Delivery.—The parol gift of a claim evidenced by a note, and the mortgage securing the same, cannot be sustained where there is a mere delivery of the mortgage but not of the note.—*McHugh v. O'Connor*, Ala., 9 South. Rep, 165.

63. HIGHWAYS — Personal Injuries — Negligence. — A highway in which is left by the commissioner of highways a road-scraper, that causes an accident to a traveler, is defective, within the meaning of Laws N. Y. 1881, ch. 700, § 1, providing that several towns shall be liable for all damages to person or property resulting from "defective highways or bridges" in such towns.—*Whitney v. Town of Ticonderoga*, N. Y., 27 N. E. Rep. 403,

64. HOMESTEAD — Co-tenant. — The homestead right does not attach to land occupied as a home by the owner of an undivided interest, and a mortgage executed by him is valid though his wife does not join therein, under the Code Tenn. §§ 2935, 2936.—*J. I. Case Threshing-Machine Co. v. Joyce*, Tenn., 16 S. W. Rep. 147.

65. HUSBAND AND WIFE—Trust — Parol Agreement.— Where a husband purchases land, and takes the title in his wife's name, though he pays for it with his own money, evidence of a parol agreement between them, creating an express trust in the land of which he is the beneficiary is inadmissible in an action brought by him after his wife's death against her heirs.—*Montgomery v. Craig*, Ind., 27 N. E. Rep. 427.

66. HUSBAND AND WIFE—Divorce.—The grantee in a deed were described therein as husband and wife, to whom the lands were conveyed in entirety, and to the heirs and assigns of the survivor. Thereafter a decree of divorce was granted to the wife, subsequent to which the husband died leaving children, the issue of their marriage. The probate court granted an order to sell the undivided half of the lands as belonging to decedent's estate, to pay debts and expenses of administration, and from this order the wife appeals: *Held*, that the divorce did not destroy the right of survivorship, and the wife became seised of the fee.—*Appeal of Lewis*, Mich., 48 N. W. Rep. 580.

67. INDIANA APPELLATE COURT — Jurisdiction. — Discussing several questions relating to the jurisdiction and *status* of the new Indiana appellate court.—*Ex parte Sweeney*, Ind., 27 N. E. Rep. 127.

68. INFANT—Contributory Negligence.—A child of the age of five years and seven months is *prima facie* incapable of contributory negligence.—*Westerfield v. Levis*, La., 9 South. Rep. 50.

69. INSURANCE—Mortgagor and Mortgagee.— A mortgagor's right to recover in his own name upon an insurance policy, in which the loss, if any, is made payable to the mortgagee as his interest may appear, depends upon his having paid the debt, or having, in some other proper manner, satisfied and discharged the incumbrance; or, possibly, he might recover by alleging in his complaint, and showing upon the trial, that the mortgage had consented to and authorized a recovery by him.—*Graves v. American Live-Stock Ins. Co.*, Minn., 48 N. W. Rep. 684.

70. JUDGMENT BY DEFAULT—Setting Aside.—The ruling of a trial court on a motion to set aside a judgment by default is largely a matter of discretion, and where the only evidence before the court was affidavits and counter affidavits, the decision will not be disturbed on appeal.—*Hoag v. Old People's Mutual Ben. Soc.*, Ind., 27 N. E. Rep. 438.

71. Judgment—Certified Copy.—In a suit on a foreign judgment, it is error to exclude as evidence a certified copy of the judgment, duly authenticated, as required by law, on the ground that it does not show the identity of plaintiff in the suit with plaintiff in the judgment.—*Missouri Glass Co. v. Gregg*, Tex., 16 S. W. Rep. 174.

72. JURY.—After the discharge of the regular jury selected by the jury commissioners the county court has no power to direct the sheriff to summons a jury to try a civil case.—*Lewis v. Merchant*, Tex., 16 S. W. Rep. 173.

73. LACHES—What Constitutes Stale Claim. — What constitutes a stale equity is regarded as a vexed question hardly susceptible of an accurate definition. It is not length of time alone that is a test of staleness, but the question must be determined by the facts and circumstances of each case, and according to right and justice.—*Neppach v. Jones*, Oreg., 26 Pac. Rep. 569.

74. LANDLORD AND TENANT—Rent.— Plaintiff agreed with a brewing company to lease it his saloon for five years, and not to engage in the saloon business during that time, nor to allow a saloon to be maintained on his property. The company agreed to pay him $50 per month during said time, and it was expressly provided that the obligation to pay should not cease by reason of surrender of the building. Before expiration of the five years plaintiff demanded and obtained possession of the building on account of the company's default in paying said rent: *Held*, that the company was still bound to pay rent for the residue of the term.—*Heims Brewing Co. v. Flannery*, Ill., 27 N. E. Rep. 286.

75. LIBEL—Evidence.—In an action for libel for making false statements in the report of the arrest of plaintiff and another person, in the recital of circumstances tending to connect them with the robbery for which they were arrested, the admission in evidence of the rough treatment which plaintiff received when arrested was error.—*McAllister v. Detroit Free Press Co.*, Mich., 48 N. W. Rep. 612.

76. LICENSE—Revocation.—Where the owner of land gives parol permission to a railroad company to enter thereon and construct its road-bed, such license is revocable only as long as it is executory, and after the company has spent large sums of money in pursuance thereof, in the construction of its road-bed and road, such license cannot be revoked.—*Messick v. Midland Ry. Co.*, Ind., 27 N. E. Rep. 419.

77. LIFE INSURANCE—Loci Contractus.—Where an application is for a policy to be payable in accordance with the terms of a future will, and, pending that, to stand in favor of the lawful heirs, and in the policy as issued and forwarded to the agent who took the application the legal heirs are to be the beneficiaries, the contract is not consummated until it is accepted by the insured, and suit can be brought thereon, under Const. Cal. § 16, only in the county where the application was made and accepted.—*Yore v. Bankers' & Merchants' Mut. Life Ass'n*, Cal., 26 Pac. Rep. 515.

78. LOGGING ON ANOTHER'S LAND—Trespass.—Where one person employs another to cut and haul logs from his own land at so much per 1,000 feet, and the employee, carelessly neglecting boundary lines, cuts logs from the land of another, and delivers them to his employer, the latter is liable, not merely for the value of the stumpage, but for the enhanced damages allowed by the statute.—*Underwood v. Paine Lumber Co.*, Wis., 48 N. W. Rep. 673.

79. MARITIME LIENS — Repairs.—An old steam-boat from which the boilers, wheel, engines, and machinery

had been removed, and which had been changed into a pleasure barge, having no independent means of propulsion, but intended to be towed by a tow-boat, and to be used in the transportation of excursion parties in the neighborhood of a city, is a vessel within the language of Act Pa. April 20, 1858, and Act Pa. June 13, 1836, and as such subject to a lien for materials furnished and work done in fitting and repairing her.—*The City of Pittsburgh*, U. S. D. C. (Penn.), 45 Fed. Rep. 699.

80. MASTER AND SERVANT — Torts of Servant.—The complaint alleged that the foreman of defendant company, who had employed plaintiff, discharged him for his refusal to do certain work, and when plaintiff did not leave the premises as quickly as he desired, he assaulted plaintiff and beat him, so that he fell and broke his leg: *Held*, that it was within the scope of the foreman's authority to use a reasonable degree of force to remove plaintiff.—*Rogahn v. Moore Manufacturing & Foundry Co.*, Wis., 48 N. W. Rep. 669.

81. MASTER AND SERVANT—Discharge of Employee.—Where an employee engaged for a definite term of service is discharged before the expiration thereof, he is presumptively entitled to recover as damages the amount of wages agreed on, subject to a reduction for compensation earned, or which he had an opportunity to earn, in other employment during the remainder of the term.—*Bennett v. Morton*, Minn., 48 N. W. Rep. 678.

82. MASTER AND SERVANT—Negligence.—It is not negligence on the part of a railroad company to have switches without lights on them in its yard, unless it appears that it was the common and uniform practice to have such lights, and that the switchmen had a right to expect them.—*Grant v. Union Pac. Ry. Co.*, U. S. C. C. (Iowa), 45 Fed. Rep. 673.

83. MASTER AND SERVANT—Monthly Hiring.—One employed and paid by the month at a fixed rate can recover for a whole month when discharged without cause near the middle thereof.—*Moss v. Decatur Land Imp. Co.*, Ala., 9 South Rep. 188.

84. MECHANIC'S LIEN—Statements. — Under the provision of Pub. Acts Mich. 1887, No. 229, "that the statement of lien shall be filed within 30 days after the completion or last day of such labor or services," the 30 days did not commence to run from the time each statement of the amount due was rendered, as there was but one contract.—*Craddock v. Dwight*, Mich., 48 N. W. Rep. 644.

85. MECHANIC'S LIEN — Notice — Description.—Under Act Ind. March 6, 1883, a notice describing the land on which a dwelling-house is situated, for which a lien is sought, correctly by township and range, but in which the reference to the section and other minor subdivisions of the congressional survey and to the county are repugnant, and cannot both stand, and which further identifies, the land by reference to the house itself, so that a person familiar with the locality could point out the premises, is sufficient to create a lien even as against judgment creditors.—*McNamee v. Rauch*, Ind., 27 N. E. Rep. 423.

86. MECHANIC'S LIEN— Contractor's Surety.—Where a surety on the bond of a contractor, given to secure the faithful performance of his contract for the erection of a building, in which it is stipulated that the contractor shall furnish and pay for all the materials used therein, is also one of the material men who furnish materials therefor, he will be precluded by his relation to the contract for the building from enforcing a lien for such materials upon the failure of the contractor to pay for them.—*McHenry v. Knickerbocker*, Ind., 27 N. E. Rep. 430.

87. MORTGAGE—Release by Acts in Pais.—A mortgagor instructed a third party, indebted to him, to pay the mortgage, and about the same time conveyed his equity of redemption, with covenants of general warranty, and left the State. Without his knowledge or consent the mortgagee gave such party an extension of time, and for more than 20 years accepted interest from him, and made no claim upon the mortgagor, who supposed the mortgage had been paid: *Held*, that the mortgage lien was released thereby.—*Dederick v. Den Bleyker*, Mich., 48 N. W. Rep. 683.

88. MORTGAGE—Foreclosure—Notice.—The recital that a mortgage "will be foreclosed by a sale" is not necessary to the sufficiency of the notice of sale, under Rev. St. Wis. § 3526, providing that "notice that such mortgage will be foreclosed by a sale of the mortgaged premises shall be given."—*Nau v. Brunette*, Wis., 48 N. W. Rep. 649.

89. MORTGAGE — Subrogation. — Where two notes, identical in date, amount, and time of maturity, but made payable to different persons, are secured by the same mortgage, it is proper, in decreeing foreclosure, to give priority to neither.—*Chaplin v. Sullivan*, Ind., 27 N. E. Rep. 425.

90. MORTGAGE — Sale Under Power — Redemption.—Where, at a sale under a power in a mortgage, third persons purchase the land, and afterwards inform the mortgagee that they cannot pay the purchase money, whereupon the mortgagee agrees to take the land at their bid, but there was no agreement whatever between him and them at the time of the sale, the mortgagee is not a purchaser at his own sale, and hence the sale is effectual to cut off the equity of redemption.—*Durden v. Whetstone*, Ala., 9 South. Rep. 176.

91. MUNICIPAL CORPORATIONS—Ordinance—Process.—Ordinance 6 of the village of Vicksburg provides that it shall be unlawful to break the peace of such village How. St. Mich. § 2839, provides that in prosecutions of individuals for violation of the ordinances of the village the warrant shall be in the name of the people of the State of Michigan: *Held*, that a warrant issued by a justice, charging a breach of the peace contrary to such ordinance, was properly in the name of the people.—*Village of Vicksburg v. Briggs*, Mich., 48 N. W. Rep. 625.

92. MUNICIPAL CORPORATION— Streets—Obstruction.—A city government may maintain a bill in equity to restrain the continuance of a permanent obstruction of a public street, as that constitutes a public nuisance.—*Reed v. Mayor, etc., of the City of Birmingham*, Ala., 9 South. Rep. 161.

93. NATIONAL BANKS—Insolvency— Directors—Stockholders.—A stockholder in an insolvent national bank for which a receiver has been appointed cannot sue its directors to make them personally liable for the mismanagement of the bank, as the right of action is in the receiver, and not in the individual stockholder.—*Howe v. Barney*, U. S. C. C. (Ohio), 45 Fed. Rep. 668.

94. NEGLIGENCE—Pleading.—In an action commenced in justice's court against a railroad company for negligently killing a mule, a motion in arrest of judgment should be sustained where the complaint does not aver that the plaintiff was without fault, nor anything from which that may be inferred.—*Cincinnati, etc. Ry. Co. v. Stanley*, Ind., 27 N. E. Rep. 316.

95. NEGLIGENCE-Instructions.-Where a declaration alleged that while plaintiff was traveling in the highway in a lawful manner defendant "carelessly, wrongfully, and unlawfully" drove his team against him at a "furious pace," but did not allege the reckless, wanton, and wilful driving necessary to constitute gross negligence, an instruction that defendant, if he saw collision was imminent, or had reason to belive that plaintiff was unaware of his approach, and could have prevented the injury with ordinary care, is chargeable with reckless injury even though plaintiff himself was negligent, is erroneous as imputing gross negligence and therefore outside of the issue.—*Denman v. Johnston*, Mich., 48 N. W. Rep. 565.

96. NEGLIGENCE—Pleading—Defective Machinery.—In an action for negligence, where it is alleged defective machinery was used, proof of the use of a "team" instead of machinery does not tend to support the plaintiff's allegation. A "team" is not a machine.—*McPherson v. Pacific Bridge Co.*, Oreg., 26 Pac. Rep. 560.

97. NEGLIGENCE—Evidence.—In a suit for the loss of a mare alleged to have been caused by a wrong entry

by a stallion, it is not competent to show, even by experts, that in their experience, they had known of wrong entries without any injurious result to the mares. *Medsker v. Pogue*, Ind., 27 N. E. Rep. 432.

98. NEGOTIABLE INSTRUMENT—Lost Notes.—In an action on a note given in payment, among other things, of an antecedent note, the jury having found that its delivery was not, as contended by defendant, conditional on the surrender of the antecedent note, and it being proven that such prior note had not been indorsed, there was no error in refusing to compel the execution of a bond of indemnity against the original note as a condition to recovery on the new note.—*Mackey v. Mackey*, Colo., 26 Pac. Rep. 554.

99. NOTARY PUBLIC—Venue of Jurat.—Since a notary public, under the laws of Michigan, is a State officer, whose official acts are not confined to the county where he resides, a claim for a logger's lien, sworn to before such notary, is not invalid because it fails to show the county where the oath was administered.—*Sullivan v. Hall*, Mich., 48 N. W. Rep. 646.

100. PARTNERSHIP—Real Estate Firm.—Where a firm is engaged in the real estate business, its lands will be considered as personalty, and a bond for title executed in the firm name by one partner, without the other's consent, binds the firm and will be enforced against both.—*Rovelsky v. Brown*, Ala., 9 South. Rep. 182.

101. PARTNERS—Several Judgments.— Where defendants are sued as partners for goods furnished to the partnership, and judgment goes by default against one of them, Rev. St. Ind. § 568, authorizing judgment to be given "for or against one or more of several defendants," does not apply, and judgment can be rendered against the other, who has pleaded to the action, only after a verdict based on evidence of his joint liability with the defaulting defendant as a partner.—*Beatley v. O'Connor*, Ind., 27 N. E. Rep. 446.

102. PLEADING—Reply—Counter-claim.—If a counter-claim may be set up in a reply, it can be only to defeat a recovery on a counter-claim in the answer, and not for an affirmative judgment on it.—*Townshend v. Minneapolis Cold Storage & Freezer Co.*, Minn., 48 N. W. Rep. 682.

103. PLEADING—Variance.—When the allegation is unproved, not in some particular or particulars only but in its entire scope and meaning, it shall not be deemed a variance, but a failure of proof.—*Stokes v. Brown*, Oreg., 26 Pac. Rep. 51.

104. PLEADING—Amendment.—Under Code Ga. § 3479, it is reversible error to refuse an amendment to defendant's plea of the general issue, by filing a plea of the statute of limitations after the cause has been submitted and the jury have retired, and been out all night.—*Savannah, etc. R. Co. v. Watson*, Ga., 13 S. E. Rep. 156.

105. PRINCIPAL AND AGENT—Authority to Agent.—An agent authorized to solicit orders for goods to be sold by his principal had no implied authority to bind his principal by an agreement that the price shall be set off against a debt which the agent owes to the purchaser.—*Talboys v. Boston*, Minn., 48 N. W. Rep. 688.

106. PRINCIPAL AND AGENT—Contract.—A written contract of agency for the sale of goods provided that the agents should pay freight charge, store the goods, and keep them insured, and that on a settlement they should hold the unsold goods subject to the principal's order and fee of expense: *Held*, that the agents were not entitled to be reimbursed for freight charge paid by them, and that evidence of a custom to that effect was not competent.— *Champion Machine Co. v. Erray*, Tex., 16 S. W. Rep. 172.

107. RAILROAD COMPANIES—Tracks on Streets—Injunction.—A temporary injunction restraining the construction of a side track or turn-out for a steam railway in the streets of a city may be granted at the instance of a citizen alleging special damage to his real estate located in the vicinity of the nuisance, and, though the evidence be conflicting as to whether he will sustain special damage or not, the discretion of the judge in granting the injunction will not be controlled unless abused. —*Savannah, etc. R. Co. v. Woodruff*, Ga., 13 S. W. Rep. 156.

108. RAILROAD COMPANIES—Crossing—Negligence.—A boy 16 years old heard a train whistle for the station, and started to run to the depot. A box-car on the side track extended a few feet over the crossing. The boy ran around the car, and, without looking for the train, he tried to cross the main track, and was struck by the engine: *Held*, that though the train was running at an unusual speed, and did not give the signals for the crossing, the boy was guilty of contributory negligence, and could not recover.—*Little Rock, etc. Ry. Co. v. Dinsemann*, Ark., 16 S. W. Rep. 169.

109. RAILROAD COMPANIES — Defective Brakes—Connecting Lines.—Where, as between connecting lines of railway, the corporations controlling them are mutually bound to transport loaded freight cars over their respective roads, such duty is necessarily subject to proper rules and regulations, and involves mutual obligations, among which is that of due diligence to provide safe cars for delivery to the servants of the company operating the connecting line to which they are transferred, and who would be exposed to danger from their defective or unsafe condition.—*Moon v. Northern Pac. R. Co.*, Minn., 48 N. W. Rep. 679.

110. RAILROAD COMPANIES — Stock killing Cases. — Where the negligence counted on is alleged to have consisted of the failure of the engineer "to reverse the engine, blow the whistle, or use the proper diligence and means at his command to avoid the accident," it is error to refuse to charge that no recovery can be had for any failure of the engineer to discover the ox sooner than it was discovered, as shown by the testimony.—*Mobile, etc. R. Co. v. Ladd*, Ala., 9 South. Rep. 169.

111. RAILROAD CONSTRUCTION—Damages.—Courts will take judicial notice that railroad lines are marked out and the grades fixed by the company's engineer; and it cannot be contended, in an action against the company for damage to property by excavations in construction of its road, that defendant is not connected with the damage; since for aught that appears, the grading contractor might have avoided the injury by making shallower cuts.—*Ala. M. R. Co. v. Coskry*, Ala., 9 South. Rep. 202.

112. RAILROAD MORTGAGE—Foreclosure—Priorities.—A claim against a railroad company for causing the death of plaintiff's intestate is a demand arising from a failure of duty, and could not by its creation benefit, preserve or increase the *corpus* of the estate of the company, and is not entitled to priority upon the foreclosure of a mortgage thereof.—*Farmers' Loan & Trust Co. v. Green Bay, etc. Ry. Co.*, U. S. C. C. (Wis.), 45 Fed. Rep. 664.

113. RECEIVER—Permission to Sue.—After the court has granted permission to the first mortgagee of chattels, who was in possession of the mortgaged property when a receiver appointed on an *ex parte* application took possession of them, to sue the receiver in replevin, and the suit had been commenced, and all proceedings had conformed to the order of the court, and a large amount of costs had accrued, it is an abuse of the discretionary power of the court to revoke the permission to sue the receiver and dismiss the action.—*Conwell v. Lowrance*, Kan., 26 Pac. Rep. 461.

114. REMOVAL OF CAUSES — Diverse Citizenship. —A case commenced in a court of Washington territory, and which was pending at the time of the admission of the State of Washington into the Union, and involving only a controversy between citizens of a State and citizens of said territory, does not, on account of the diverse citizenship of the parties, come within the jurisdiction of a United States circuit court, and is not transferable thereto, unless the jurisdiction can be predicated upon some other ground. — *Nickerson v. Crook*, U. S. C. C. (Wash.), 45 Fed. Rep. 658.

115. REPLEVIN—Pleading.—In replevin for a horse a complaint is sufficient as to description which describes the property as "one gray horse, six years old this

spring, about 16 and one-fourth hands high, with a small knot about half-way between the right nostril and right eye, near the front of face or nose, with collar-mark on top of neck, dark mane and tail, with top end of tail light in color."—*Wood v. Darnell*, Ind., 27 N. E. Rep. 447.

116. RES ADJUDICATA—Administration.—A decree rendered at the suit of executors for the construction of a will, declaring them individually liable for a legacy, and that it is a lien on land devised to them, is notice to a subsequent mortgagee of the land, and the supreme court will not, at his instance, reconsider and reverse its decision affirming it.—*American Mortg. Co. v. Boyd*, Ala., 9 South. Rep. 166.

117. RIPARIAN RIGHTS—Tide-lands—Trespass.—A riparian owner of land bordering on tide-waters cannot maintain ejectment against persons who have taken possession of, and erected buildings on, the land below high-tide mark, the title and power of disposal of which has been reserved to the State of Washington by the constitution.—*Pierce v. Kennedy*, Wash., 26 Pac. Rep. 554.

118. SALE—Evidence.—In an action for the price of logs, it was shown that M & R scaled the logs; that M took the measurements at one end, and called them out to R, together with any defects apparent to him, and that R, relying upon the correctness of his statements, took the measurements at the other end. M did not testify at the trial: *Held*, that R's testimony as to the scaling was incompetent, for his measurements depended solely on the accuracy of M's, as to which there was no evidence.—*Sovereign v. Mosher*, Mich., 48 N. W. Rep. 611.

119. SALE—Warranty.—Where defendants bought a machine by written order and received a written warranty thereof, in an action on a purchase money note they cannot recoup damages for the breach of an alleged verbal warranty made contemporaneously with the written contract, without showing that there was a waiver of the written contract and warranty, and a substitution of the verbal warranty therefor.—*M. Rumley & Co. v. Emmons*, Mich., 48 N. W. Rep. 636.

120. SCHOOL—Supplies—Evidence.—A school commissioner and superintendent for the county, and a person who has followed farming in summer and taught school in the winter in the township in which the purchased supplies were to be used, are competent to testify as to the usefulness and necessity of such supplies in the township.—*Litton v. Wright School Tp.*, Ind., 27 N. E. Rep. 329.

121. SCHOOL LANDS—Lease.—The power of a township trustee, under Rev. St. 1881, §§ 4328, 4329, to rent school lands for a term not exceeding seven years, and reserve rents payable in money, property, or improvements on the land, provided a majority of the voters so direct, must be strictly construed.—*Anderson v. Prairie School Tp.*, Ind., 27 N. E. Rep. 439.

122. SCHOOL TAX—Collection—Compensation.—Where a school tax was levied by town authorities, the law providing that the money so raised should be used only for establishing and maintaining public schools in said town, and making it the duty of the treasurer of the town to recover all said money from the mayor and council, and where by authority of law said mayor and council had appointed a collector of all taxes imposed by them, and provided that he should receive a certain per cent. thereof a compensation for his services, such collector had the right to retain from the school fund his commissions for collecting the same.—*Mayor v. Board of Education*, Ga., 13 S. W. Rep. 133.

123. SPECIFIC PERFORMANCE.—A complaint for specific performance, which alleges that defendant executed a contract wherein it offered to convey lands at a certain price, and to keep the offer open for two years, provided plaintiff would insure the property for the defendant's benefit, is insufficient, when it fails to allege that plaintiff did insure the property.—*Chadbourne v. Stockton Savings & Loan Soc.*, Cal., 26 Pac. Rep. 529.

124. STATE BOUNTIES TO SOLDIERS.—Act. Mich., Feb. 5, 1864, which provides for the payment of a bounty to any one who shall enlist in military or naval service of the United States, and be credited on the quota of this State "under any call or order of the president made or issued since the first of January, 1864," applies only to enlistments under calls made between that time and the passage of the act, and not to those made thereafter.—*Smith v. Board of State Auditors*, Mich., 48 N. W. Rep. 627.

125. SUBROGATION—Mortgage.—The right of subrogation will not be enforced to the prejudice of innocent purchasers.—*Ahern v. Freeman*, Minn., 48 N. W. Rep. 677.

126. TAXES—Collection.—A warrant to collect taxes is not a "process," within the meaning of the provision of the constitution relative to judicial proceedings, and it is not essential to its validity that it shall run in the name of the people.—*Haley v. Elliott*, Colo., 26 Pac. Rep. 559.

127. TRESPASS FOR FLOWAGE OF LANDS.—Where a riparian proprietor builds a dam which causes the water to set back, injuring the crops of his neighbor, the fact that the county line coincides with the dividing line of the farms will not bar an action in the county of the injured party.—*Thorn v. Maurer*, Mich., 48 N. W. Rep. 640.

128. TRIAL—Defective Machine.—In an action for sale of "cash register," where defendant alleged that the machine failed to operate correctly, it was not error to allow a witness to operate it before the jury in order to demonstrate that the alleged mistakes were made by the operators, and not by the machine, when evidence had been introduced that it was the same machine and that its mechanism had not been changed.—*National Cash Register Co. v. Blumenthal*, Mich., 48 N. W. Rep. 622.

129. TRIAL—Failure to State Defense to Jury.—Where, in a suit on account, defendant pleads payment and counter-claim, itemizing his counter-claim, his failure to formally read the pleas to the jury at the opening of the trial does not deprive him of the right to give evidence in their support.—*Allen v. Hagan*, Tex., 16 S. W. Rep. 176.

130. TRUSTS—Parol Evidence—Fraud.—In an action to have a trust as to certain real and personal property declared and enforced, plaintiff alleged that, being so far deranged that he was entirely incompetent to transact any business, he was induced to convey the property to defendant by his false and fraudulent representations that he would take care of and manage it, pay off plaintiff's debts, and then transfer the property to plaintiff; that there was no other consideration; that defendant knew the representations to be false and untrue, and made the same with intent to deceive and defraud plaintiff. *Held*, that the facts alleged show a trust arising from fraud under Civil Code Cal. § 852.—*Hayes v. Gloster*, Cal., 26 Pac. Rep. 867.

131. VERDICT—Sufficiency.—A verdict is not sufficiently certain when it cannot be made certain by reference to the record.—*Moriarty v. McDevitt*, Minn., 48 N. W. Rep. 684.

132. WATERS—Navigable Streams.—A bill in equity stating that a certain stream within this State is in fact navigable for the purposes of public commerce, without any direct averment that the State is the owner of the bed of such stream or of the deposits therein, does not allege the title or right of the State with such sufficient certainty as would warrant the granting of an injunction, therein prayed, to restrain the removal of phosphatic or other deposits therefrom, or to require an answer to such bill.—*State v. Black River Phosphate Co.*, Fla., 9 South. Rep. 205.

133. WILL—Powers—Sale.—The power to convey is included in an authority to executors to sell "such real estate as I now own or may acquire," and the executors may sell and convey land which has been purchased by them at a bankrupt sale to save purchase money due the testator therefor.—*Preuser v. Terry's Ex'rs*, Ky., 16 S. W. Rep. 133.